UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

N.Y.C. 2 WAY INTERNATIONAL, LTD.
Employer[1]

and Case No. 29-RC-9411

LOCAL LODGE 340, DISTRICT LODGE 15,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Petitioner[2]

and

LOCAL 713, NATIONAL ORGANIZATION
OF INDUSTRIAL TRADE UNIONS
Intervenor[3]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Amy Krieger, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

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1 The Employer's name appears as amended at the hearing.

2 The Petitioner's name appears as amended at the hearing.

3 Local 713's status as an intervenor in this proceeding is based on a showing of interest.

Upon the entire record[4] in this proceeding, the undersigned finds:

1. In an offer of proof, NYC 2 Way claimed that Mohammed Shah, who has driven for NYC 2 Way for 10 years, would testify that he also performed work through other companies during that period. Specifically, the proffered evidence included testimony that Shah bills approximately $4,000 per year to a customer called Coats Viyella Clothing Corp., for airport pickups and other trips in the New York City area; that he earned approximately $2,000 in 1998 through a company called Night Rider; and that he also earned approximately $9,000 in 1999 through Northeast Limousine. The Hearing Officer sustained an objection that the proffered evidence was irrelevant, and rejected the offer of proof. I hereby reverse the Hearing Officer's ruling, inasmuch as work performed by drivers for other transportation companies is relevant to their status as independent contractors or employees. Nevertheless, I also find the ruling to have been harmless error, inasmuch as the proffered evidence was insufficient to affect the results of the case.

The Hearing Officer's other rulings made at the hearing were free from prejudicial error and hereby are affirmed.

2. The record indicates that NYC 2 Way International, Ltd., herein called NYC 2 Way or the Employer, is a New York corporation with its principal office and place of business at 335 Bond Street, Brooklyn, New York, and is engaged in providing

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4 The undersigned Regional Director hereby amends the transcript sua sponte as indicated in the Appendix attached hereto. References to transcript page numbers are herein abbreviated as "Tr. #". References to exhibits are abbreviated as follows: "Er. Ex. #" refers to Employer exhibit numbers; "Pet. Ex. #" refers to Petitioner exhibit numbers; and "Bd. Ex. #" refers to Board exhibit numbers.

dispatched transportation services, including limousine car service to the general public.[5] The parties stipulated that, during the past year, the Employer derived gross revenues in excess of $500,000, and derived revenues in excess of $5,000 from firms located outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Local Lodge 340, District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Petitioner, seeks to represent a unit of all full-time and regular part-time drivers employed by NYC 2 Way. However, NYC 2 Way asserts that the drivers are self-employed independent contractors, rather than employees within the meaning of Section 2(3) of the Act.

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5 The parties stipulated to a "retail" standard for jurisdiction, even though the record indicates elsewhere that NYC 2 Way provides services primarily, if not exclusively, to corporate customers (i.e., non-retail). The record also indicates that NYC 2 Way receives more than $26 million per year in revenues from such corporate customers as Goldman Sachs, Morgan Stanley, and the National Broadcasting System; and drives those companies' employees to such out-of-state locations as Newark Airport in New Jersey, and various locations in Connecticut. Thus, even if NYC 2 Way's services are not paid for by individual consumers on a "retail" basis, it appears likely that NYC 2 Way would meet other jurisdictional standards, such as deriving at least $50,000 in revenues from operating as "instrumentalities" of interstate commerce, Boston Cab Assn., 177 NLRB 64 (1969), Open Taxi Lot Operation, 240 NLRB 808 (1979), or providing services valued in excess of $50,000 to other enterprises within the State of New York which are, in turn, directly engaged in interstate commerce (indirect outflow of services).

In support of its assertion regarding the drivers' status, NYC 2 Way called three witnesses to testify: Helmy Hussein (general manager), and Samih Zabib (driver and current Security Committee co-chair) and Mohammed Shah (driver). The Petitioner called two witnesses to testify: Tariq Bhatti (driver) and Fares Albasir (former driver and Communications Committee chair).

Overview of NYC 2 Way's operations

NYC 2 Way provides luxury car and limousine transportation services to corporate customers in the New York City area, generally known as the "black car" industry. This industry is regulated by the New York City Taxi and Limousine Commission (TLC). NYC 2 Way is owned by two brothers: Edward Slinin, who is the company's president, and Mark Slinin, who is vice president. However, only Edward Slinin is involved in the day-to-day operations of the company. NYC 2 Way's base of operation is located at 335 Bond Street in Brooklyn, the same location as another black car company owned by Edward Slinin, Arista Car and Limousine, Ltd.[6]

Helmy Hussein is the general manager of NYC 2 Way. Other people who work at NYC 2 Way's base include: Kathy Nicholson (dispatch manager); Marina Sorota (billing supervisor); Max Rutenberg (manager); Jimmy Jiminez and Joseph Asachi (franchise sales employees); Rita Deegan (customer sales); Adina Lozado (customer service); Ron Karp (comptroller); and Michael Lyman (assistant comptroller). The parties stipulated that these people are supervisors and/or agents of NYC 2 Way. NYC 2 Way also

6 Arista Car's drivers are the subject of a related petition, Case No. 29-RC-9410. All references to "Slinin" hereinafter refer to Edward Slinin, unless otherwise indicated.

employs at its base numerous call-takers, operators, dispatchers and administrative/clerical employees.

NYC 2 Way has more than 4,000 corporate accounts, and averages 12,500 rides per week. NYC 2 Way charges its customers rates that are enumerated in various rate books, including a general rate book (Er. Ex. 6(a)), and rate books negotiated with specific customers (e.g., Er. Ex. 6(c) for Goldman Sachs, Er. Ex. 6(e) for Morgan Stanley). The charges include a set charge for the ride itself based on geographical zones or locations, plus extra charges for such items as waiting time, tolls, and use of the in-car telephone. To pay for their rides, passengers generally submit vouchers to the drivers. Eventually, each driver submits the vouchers to NYC 2 Way which, in turn, bills the corporate customers. NYC 2 Way also charges the customers a "service charge" of up to $2 per voucher. In order to stay competitive with other black-car companies, NYC 2 Way sometimes gives discounts to customers. (The extent to which the cost of those discounts may be passed along to drivers is discussed separately below.) Finally, under New York state law, NYC 2 Way is required to charge customers a 2% surcharge to be remitted to a special workers' compensation fund for black-car industry drivers.[7]

At the time of the hearing in February 2000, there were approximately 500 drivers working from NYC 2 Way's base.[8] The drivers own their own vehicles. In order to obtain access to NYC 2 Way's computer/radio dispatching system and equipment, drivers

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7 *See* Tr. 191-4; Em. Ex. 13. A law establishing the New York Black Car Operators' Injury Compensation Fund became effective in May 1999. For purposes of providing workers' compensation under that law only, black-car drivers are treated as "employees" of the Fund. Central dispatch facilities are required to submit the surcharge monies (collected from customers) to the Fund.

8 The record indicates that NYC 2 Way uses radio-number designations from 1 to 499 (See Tr. 1245-6, 1777, 2134). By contrast, Albasir testified that Arista Car uses radio numbers 500 and higher.

may either purchase a "franchise" (described in more detail below) or lease "radio rights."

Of the 500 current drivers, approximately 360 are considered franchisees and 110 to 125 are lessees.[9] The lessees, in turn, include at least 70 drivers who lease directly from NYC 2 Way, and at least 40 who lease from individual franchise owners.

Becoming a franchisee

NYC 2 Way's franchise sales representatives (Jimmy Jiminez and Joseph Asachi) sell franchises to prospective drivers. The sales people ask questions about the driver's previous experience in the industry, assess the driver's ability to speak English, and determine whether the driver has the appropriate licenses and other documentation (including a driver's license, a TLC chauffeur's license, vehicle license and insurance). The sales people also explain the financial terms and conditions.

It is not clear from record how the franchise sale is actually consummated. A 60-page, bound document entitled "Franchise Offering Prospectus" (Er. Ex. 2) which NYC 2 Way filed with the Federal Trade Commission, includes a copy of a 14-page, single-spaced "franchise agreement" with blank signature lines on the last page. Witnesses differed as to whether franchisees actually sign or even receive a copy of this document. Hussein testified that franchisees sign a copy of this franchise agreement, and Employer witness Zabib also stated that he signed such an agreement when he became a franchisee

9 *See* Er. Exs. 20 and 39, compilations of figures made by general manager Hussein. For some reason that is not clear from Hussein's testimony, the numbers of franchisees and lessees given in these exhibits do not add up to 500.

in 1994.[10] However, Petitioner witness Albasir testified that, when he became a franchisee in 1994 he was never given a copy of this agreement, and never signed it. Instead, Albasir signed a single "piece of paper" showing his agreement to purchase radio rights for $15,000, paying $100 per week for four years. (*Compare* Er. Ex. 23, blank copy of a one-page "deposit" agreement, which includes provisions for both franchise payments and security deposit payments.) Albasir said he had only seen Er. Ex. 2 once before the hearing, when the former Communications Committee chairperson (Mohmoud Kahnfor, also known as Car #102)[11] pointed out a certain provision to him. No copies of *signed* agreements were introduced into evidence.

Since 1996, NYC 2 Way has set the price of a franchise at $32,000. General manager Hussein initially explained that franchisees could choose either to finance their franchise purchase through NYC 2 Way or, in theory, they could obtain financing from certain third-party institutions such as credit unions. However, Hussein later indicated that, in reality, all franchises payments since at least 1998 have been financed directly by NYC 2 Way; no franchise payments are being made via financing from third-party institutions. NYC 2 Way does not require a down payment on the franchise purchase. However, the buyer agrees to have a certain amount deducted from his earnings per week (e.g., $110 or $130) until the entire amount is paid off ($32,000 plus 10% to 15% interest). According to Hussein, of the 360 franchisees, approximately 200 own their

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10 At the time that Zabib became a franchisee in 1994, the company was known as NYC 2 Way, Inc., and the franchises cost $15,000. In 1996, the company became NYC 2 Way International, Inc., and the price of a franchise increased to $32,000.

11 Most witnesses referred to the drivers by their car numbers. Where possible, this Decision will also identify drivers by name. However, for the sake of consistency with the transcript, the impersonal car number will be used herein as well.

franchises "outright" (i.e., have finished paying for it), whereas the remaining 160 are still making the franchise installment payments to NYC 2 Way.

New franchisees must have NYC 2 Way's computer/radio dispatch equipment installed in their car. Since NYC 2 Way uses a combination of computer and radio communications to dispatch jobs, the equipment consists of a two-way radio, computer modem, computer screen, and a specialized key pad for various dispatch-related codes. The equipment remains the property of NYC 2 Way. The franchisee must pay a $2,000 security deposit for the equipment. Of this deposit, a non-refundable portion of $500 covers the cost of installing the equipment, and the cost of a training program (described in more detail below). The remaining $1,500 of the deposit may be refunded after the driver leaves NYC 2 Way and returns the equipment. The franchisee does not need to pay the entire deposit up front. Hussein explained that the franchisee could pay between $300 and $500 up front, and then have $25 to $50 per week deducted from his earnings until the $2,000 has accumulated.[12] Or, alternatively, the franchise sales representatives could agree to waive any up-front payment, and have the entire security deposit paid in installments deducted from the driver's earnings.

Drivers must carry certain other equipment in their cars, such as a credit card machine. They must display the NYC 2 Way logo and franchise number in the car window at any time they are logged onto the company's dispatch system or are transporting the company's customers.

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12 Male pronouns are used herein to refer to the drivers generically, since the majority appears to be male.

As noted above, the vehicles are owned by drivers, not by NYC 2 Way. NYC 2 Way does not help to finance the purchase of cars. There appears to be no dispute that drivers are required to drive a four-door Lincoln or Cadillac.[13] NYC 2 Way's franchise sales representatives initially inspect the driver's car, to make sure it is in good condition. Subsequently, if NYC 2 Way receives any complaints from customers about the condition of a car, the company may require the franchisee to fix or replace it. Drivers must maintain certain insurance coverage, as required by the TLC. Drivers must have a car telephone in order to perform jobs involving an out-of-town pickup. The record is contradictory as to any limitations on the vehicles' color. The franchise prospectus expressly requires a "dark-color" sedan (Er. Ex. 2, p. 4), and Term 7 of the franchise agreement (Er. Ex. 2, p. 2)[14] requires "a vehicle of the make, model, color" as required by the Communications Committee[15] whose rule book, in turn, requires "black, dark grey or dark blue" cars (Er. Ex. 3, p. 4). However, Hussein denied that there were any color restrictions. When asked on cross examination whether a driver could have a chartreuse car, he said that the only prohibited color is white, since some customers have expressly said they do not want white cars.

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13 There was some inconsistency in the record regarding the vehicle requirements. NYC 2 Way's new rate book promises customers "late model Lincoln Town Cars" (Er. Ex. 6(a)), whereas the franchise prospectus requires either a Lincoln Town Car or Cadillac Fleetwood Brougham, not more than three years old (Er. Ex. 2, 4) and the NYC 2 Way Rules and Regulations Manual requires a late-model Lincoln Town Car or Cadillac Fleetwood (Er. Ex. 3, p. 4). However, both Hussein and Zabib denied that specific models are required, despite those written requirements. In any event, Hussein conceded that a Lincoln or Cadillac is required.

14 As mentioned above, Er. Ex. 2 consists of a 60-page document containing the franchise prospectus, various financial statements, and the franchise agreement. However, the pages are not numbered consecutively. Any references herein to the franchise *prospectus* page numbers refer to pp. 1-14 at the *front* of Er. Ex. 2, whereas any references to the franchise *agreement* refer to pp. 1-14 at the *back* of the document.

New franchisees may receive four days of training from an experienced driver in order to learn the routes, the computer dispatch manual and codes, how to use the computer/radio equipment in their cars, how to price the vouchers and various other rules. The training includes three days spent in a training room at NYC 2 Way's base, and then one day spent "co-piloting" or observing in the trainer's car. The trainer also administers certain tests, including a test of the driver's knowledge of highway routes. However, the franchise sales people may initially determine that a driver with enough experience in the industry does not need the training. Since early 1998, driver Zabib (who is also co-chair of the Security Committee) has trained new drivers. Previous trainers included Car #102 (former Communications chair Mohmoud Kahnfor) and Car #293 (Mitch, last name unknown, former co-chair of Communications). Zabib testified that Joseph Asachi in NYC 2 Way's franchise sales department asked him to become the trainer after Car #293 left the company. NYC 2 Way pays Zabib $100 for every driver that he trains. The money comes from the $500 non-refundable portion of the franchisees' security deposit, as mentioned above.

New franchisee-drivers are normally subject to a 30-day probationary period, during which NYC 2 Way does not assign them to any out-of-town pickups[16] or airport jobs, in case they are not sufficiently familiar with the highway routes involved. However, Communications chair Zabib can decide that an experienced driver does not need the 30-day period. In that event, he notifies NYC 2 Way's dispatch manager, Kathy Nicholson, who removes the restriction from the driver's computer "file," so that the

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15 The drivers' committees (Communications, Security, Appeals and Sunshine) will be described in more detail below.

computerized dispatch program no longer skips over the new driver for out-of-town pickups and airport jobs.

Documents purportedly governing the relationship between NYC 2 Way and drivers

As described above, there is contradictory evidence as to whether franchisee-drivers actually sign or receive a copy of the "franchise agreement," admitted into evidence as part of Er. Ex. 2. It appears from the record that NYC 2 Way is required to file a copy of the franchise prospectus/agreement with the Federal Trade Commission, as well as New York State Attorney General's Bureau of Investor Protection and Securities. However, the record is replete with testimony -- from both NYC 2 Way's witnesses and the Petitioner's witnesses -- that the written terms of this document are not followed in practice. For example, as mentioned above, the franchise agreement requires drivers to have a dark-color sedan, but Hussein denied there is any such restriction. The agreement also requires franchisees to name NYC 2 Way as "co-insured" on their insurance policy, but Hussein testified to the contrary. Section 44 of the agreement lists numerous franchisee infractions (e.g., transferring or removing the computer/radio equipment from the vehicle without NYC 2 Way's written authorization, permitting someone else to operate the franchise without NYC 2 Way's written authorization, failing to submit vouchers in a timely manner, failure to maintain vehicle in safe and clean condition, causing customers to use the services of NYC 2 Way's competitors, etc.) for which NYC 2 Way may terminate the agreement, but Hussein testified that most of these rules are not

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16 "Out of town" refers to locations outside of New York City, such as Long Island, New Jersey and Connecticut.

in effect or are not enforced.[17] Thus, for purposes of fact-finding in the instant proceeding, it is difficult to know how much reliance to place on this document, although it purportedly governs NYC 2 Way's relationship with its franchisee-drivers.

Similarly, there was a great deal of disputed testimony regarding NYC 2 Way's Rules and Regulations Manual (Er. Ex. 3), which is incorporated by reference into the franchise agreement. It should be noted that the Taxi and Limousine Commission requires base operators, such as NYC 2 Way, to "maintain and enforce rules governing the conduct of affiliated drivers," and to give TLC a copy of said rules, plus a copy of any amendments within seven days. (*See* Er. Ex. 10, Section 6-07(c).) The franchise prospectus specifies that NYC 2 Way "reserves the right to modify, supplement, or change the Rules and Regulations governing the conduct of all Franchisees, provided that the rules promulgated are reasonable" (Er. Ex. 2, Section 17(i) of prospectus). Initially, Hussein denied that NYC 2 Way had any rule book whatsoever, and denied that the reference to "rules" in the franchise agreement referred to Er. Ex. 3 (e.g., Tr. 575-6). However, upon further questioning by the Hearing Officer, Hussein eventually conceded that the "rules" indeed referred to the Er. Ex. 3. There is no dispute that NYC 2 Way paid to have copies of the book printed. Nevertheless, both Hussein and Zabib insisted that members of the drivers' Security and Communications Committees, not NYC 2 Way, actually drafted the rule book. The cover page of document itself states the following:

> The Security and Communications Committee of NYC 2 Way International, LTD composed this book of rules and regulations. Neither NYC 2

[17] It is interesting to note that Section 44.16 of the franchise agreement forbids franchisees from "stating or implying to any person or entity that Franchisee's relationship with Franchisor is not a Franchisor/Franchisee relationship with Franchisee acting as an independent contractor." Hussein testified that this provision is not grounds for termination of the franchise agreement, despite express language in the agreement to the contrary.

Way, nor any of its personnel, faculty or management was involved in the creation of this book.

Hussein testified that this version of the rule book was initially created by Car 126 (named "Fima") and Car 293 ("Mitch"), who became chair and co-chair, respectively, of the Communications Committee in early 1997. Hussein also said that the book was reviewed by Car 345 (Mohammed Kamnaksh), who became Security chair in early 1998; that the book was printed in December 1998 or January 1999, and then distributed to drivers at a meeting in February 1999.

Zabib testified that, shortly after he became the Security Chair in early 1997, he helped Cars 126 and 293 create the rule book. Zabib stated that they took a copy of an earlier rule book (Er. Ex. 33) and the computer dispatch manual (Er. Ex. 15), solicited ideas from other drivers, and used their own experience as drivers in order to come up with a revised rule book. Zabib claimed that they did not consult anyone in NYC 2 Way's management about the revision. Zabib said that the three drivers worked on this revision for several months, meeting on Mondays at the base and on weekends; that he himself did not write any portions; and that Cars 293 and 126 wrote pages by hand and later typed them into a home computer. Contrary to Hussein's chronology, Zabib testified that that the new rule book was printed in November 1997, although for some reason he also said that it was not put into "use" until February 1999.

It should be noted that the NYC 2 Way rule book (Er. Ex. 3) is identical to the rule book of Arista Car (Pet. Ex. 6), another company owned by Edward Slinin which operates from the same base in Brooklyn. Except for the change in company names, the books are the same *word for word* and even have the same typographical mistakes. There was testimony in Case No. 29-RC-9410 that certain Arista Car drivers, like the

NYC 2 Way drivers, drafted their own Arista Car rule book after gathering information from various sources, making hand-written drafts and later typing them, and so forth. When Zabib was asked whether Arista Car drivers had access to the NYC 2 Way rule book, he initially said no, that the NYC 2 Way rule book is kept in a locked closet for which he alone has the key. To his knowledge, no one from Arista Car asked for a copy of the NYC 2 Way rule book or otherwise had access to it. However, Zabib later contradicted himself by stating that, one time in 1997 or 1998, the Arista Car Security chair asked to read a copy of the NYC 2 Way rule book. There is no explanation in the record of how two different committees of drivers -- who allegedly went through two separate drafting processes -- happened to come up with two identical documents. The inherent improbabilities of that coincidence and the testimonial contradictions obviously raise the possibility that someone other than the committees, such as NYC 2 Way management, actually created the rule books. However, there is no direct evidence in the record to support this possibility.

In any event, the rule book, like the franchise agreement, seems to bear little resemblance to how NYC 2 Way actually operates. In an exhaustive cross-examination regarding the creation and operation of the rule book, Zabib noted that many of the "rules" are not really rules, or are not really enforced. For example, although the rule book requires drivers to have a black, dark grey or dark blue Lincoln Town Car or Cadillac Fleetwood (Er. Ex. 3, p. 4), Zabib claimed that drivers have all different models and colors of cars, and that the rule has never been enforced. Zabib was asked why the drivers who allegedly revised the rule book (himself, Car 126 and Car 293) included this "rule" in the book, if it is not enforced; Zabib responded that the Communications chair

"has to make a book," and that the chair wanted to include the rule to "make the fleet look good." In addition, the rule book provides a dress code for men, requiring a full suit, a solid white or solid blue dress shirt, dark-colored dress shoes and socks, and other items. Religious head coverings (if any) must also be dark-colored (Er. Ex. 3, pp. 7-8). However, Zabib stated that many of these rules are not enforced. Drivers wear light colored socks and turbans, without consequences of any kind. As another example, the rule book states that any driver caught working without a full set of road maps will be taken "off the air" immediately (Er. Ex. 3, p. 14), but Zabib said this is not enforced. After many examples were given to show that Er. Ex. 3 does not reflect the actual rules, the Hearing Officer asked the following questions:

> H.O.: What was the purpose in your reviewing the book?
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> Zabib: To see if everything there is correct.
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> H.O. Now you just testified that there are a number of things that were not correct, they weren't correct at the time you reviewed them. But you also testified that you didn't tell him [the Communications chair] to take them out, right?...
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> Zabib: Yes.
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> H.O.: So my question is, why didn't you tell him to take it out at the time that you reviewed the book in 1997? ... Why didn't you tell him to delete these things because they were meaningless?....
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> Zabib: He got to make a book, so this is the book he make.
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> H.O.: So you don't really know? Is that your answer?
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> Zabib: No.
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> H.O.: You don't have any explanation as to why?
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> Zabib: No, I don't have any explanation.

The Petitioner's witnesses essentially denied that Er. Ex. 3 actually operated as a rule book governing the driver's conduct. Tariq Bhatti testified that he had never even seen the rule book. Fares Albasir testified that he saw the book only once, in March 1999, when he happened to see it in a box at the NYC 2 Way base. However, Albasir did not read the book, and did not rely on it when he himself became Communications Chair. The only rules he knew of were rules communicated by NYC 2 Way management. For example, he recalled receiving a written memo from NYC 2 Way management, stating that drivers would be fined $200 if they did not wear a white shirt while driving customers. Albasir also testified that NYC 2 Way occasionally sent messages to drivers over the computer (appearing as "fleet messages" on the computer screen in the drivers' cars) reminding drivers of the dress code rules.

In short, although the record contains these two documents which purport to show the terms of the contractual "franchise" relationship between NYC 2 Way and the drivers, and which purport to show the rules governing the drivers' conduct, the witnesses' conflicting testimony raise serious doubt as to the documents' origin and applicability. Other examples of where the written rules diverge from the actual practice will be noted below, in connection with other specific topics.

Finally, two instructional booklets should be noted. A "drivers' manual" (Er. Ex. 4) contains 40 pages of map-reading instructions and geographical information regarding local roads, bridges, tunnels and airports, plus a few pages of general instructions regarding courtesy to customers, and how to use the voice dispatch system in case of computer failure. Hussein testified that Car 293 (the former Communications co-chair) drafted this book in 1997. Hussein denied that NYC 2 Way asked Car 293 to do. He said

that Car 293 "just did it," and then gave NYC 2 Way the book to send to a printer. Initially, Hussein denied that NYC 2 Way had reviewed the book (saying that they did not even "look" at it), but then he conceded that he and Slinin had reviewed it to make sure the content (the "knowledge") was correct. In any event, there appears to be no dispute that the drivers' manual is actually used for training purposes.

Another instructional document is the "NYC computer dispatch manual" (Er. Ex. 15), which tells drivers how to use the computer/radio dispatch equipment, including various dispatching codes. Hussein testified that Car 102 (Kahnfor, former Communications chair and trainer) drafted this book in 1994, based on information from the Aleph computer company that installed NYC 2 Way's new dispatching systems at that time. The extent to which this book was -- or is still -- in use is not clear from the record. Hussein testified that new drivers are given a copy, and Albasir also acknowledged the manual as a document he had seen, but Bhatti testified that he had never seen it. Hussein, acknowledging that some of the codes had changed since 1994, claimed that the Communications committee made and "attach[ed]" amendments to the manual, but no such notices or amendments were attached to the exhibit. There appears to be no dispute that NYC 2 Way pays for and distributes to new drivers a plastic laminated "quick start" card (Er. Ex. 36) which summarizes the computer dispatching codes for easy reference.

Compensation of drivers

As noted above, individual passengers do not generally pay cash for their rides, but submit vouchers which are billed to their corporate employers. Drivers submit those vouchers to NYC 2 Way in order to get paid. From the gross amount of the voucher payments, several deductions are made. First, as mentioned above, drivers who are still

paying off the $2,000 equipment deposit and/or the $32,000 franchise purchase have those weekly installments deducted. Second, drivers pay NYC 2 Way a "commission" or "service fee" of either 17.5% or 22%, depending on how quickly they want to be paid. Specifically, NYC 2 Way deducts a commission of 17.5% if a driver waits three weeks (from the date of submitting the vouchers) to get paid, and 22% if he wants to get paid in only two days.[18] Third, NYC 2 Way deducts a weekly fee (sometimes called "dues" or "radio dues") of $44 for a single driver, $60 for drivers who share a vehicle on a double-shift basis.[19] Fourth, NYC 2 Way also deducts a dollar-per-voucher fee.[20] (This is in addition to the per-voucher service charge paid by customers.) Finally, NYC 2 Way deducts a 50¢ per-voucher charge, up to a maximum of $1,000 per franchisee, for something called the "radio club," which is described in more detail below.

Hussein testified that these deductions can be stopped when a driver decides to go on vacation, or to take any other kind of temporary leave, for time periods ranging from one week to a number of years. The driver must physically turn in his radio equipment, also known as putting the radio "on the shelf," to NYC 2 Way's franchise sales department, and ask NYC 2 Way not to make deductions during that time. (NYC 2 Way does not return the driver's equipment deposit unless and until the driver indicates that he is leaving permanently.) Thus, franchise payments, commissions, dues, per-voucher fees

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18 The franchise prospectus/agreement (Er. Ex. 2) lists the service fees at 15% for payment within two to four weeks; 20% for payment within one week; and 22% for payment within one day of submitting the vouchers. The prospectus/agreement also states: "These service fees can be increased, respectively, to 30%, 40% and 50% on two weeks written notice." Testimony regarding how the fees were increased in October 1999 is described below.

19 The franchise agreement reserves NYC 2 Way's right to increase the weekly fees to $125 for a single shift, and $175 for a double shift "at any time without notice" (Er. Ex. 2, p. 1).

20 The franchise agreement reserves NYC 2 Way's right to increase this fee to $30 per voucher "at any time without notice" (Er. Ex. 2, pp. 6-7).

and radio club payments are deducted only when the drivers are actually driving and turning in vouchers.

Hussein testified that, on rare occasions, a passenger may pay cash for a ride (such as to attend to a personal errand), rather than submitting a voucher via his corporate employer. In those instances, the driver is allowed to keep the entire cash fare, without per-voucher fees or any other deductions made. Hussein estimated that each driver gets only one or two cash fares per year.

NYC 2 Way does not deduct taxes on drivers' income. At the end of year, drivers receive a so-called 1099 form for federal income tax purposes, showing the gross amount earned.

Currently, NYC 2 Way does not pass along the cost of customer discounts to the drivers. However, it has done so in the past, and the franchise prospectus/agreement reserves NYC 2 Way's right to give customers discounts of up to 25% and to pass the cost of the discount to drivers. (Er. Ex. 2, Section 16(c) of prospectus, Section 36 of agreement.) Hussein testified that at some point in 1999, NYC 2 Way decided to offer discounts to its customers. In late August or early September, NYC 2 Way issued a memo to drivers (Pet. Ex. 1) explaining *inter alia* that up to 5% of the discount cost would be passed along to drivers. Hussein testified that one or two weeks later, after drivers had complained, he and NYC 2 Way president Slinin met with certain driver committee members (Albasir/Car 20, Car 21 and Car 453). At the meeting in September 1999, Slinin agreed not to pass along the discount cost to drivers but, in exchange, he increased their commissions to the current rates of 17.5% for three-week payments and

22% for two-day payments. According to Hussein, these changes then went into effect in October 1999.[21]

The record also indicates that NYC 2 Way sometimes gives drivers an opportunity to work on an hourly-paid basis. For special events when a large number of cars are needed, NYC 2 Way offers an hourly rate of pay. For example, in December 1999, when 125 drivers were needed to work during Goldman Sachs' holiday party, NYC 2 Way offered to pay drivers $45 per hour for at least three hours of work. A memo was distributed to drivers with their paychecks, telling them to contact NYC 2 Way by December 2, 1999, if they were interested (Pet. Ex. 1). A similar opportunity was available for New Year's Eve. Drivers do not have to work during these special events if they do not want to.

Finally, the record also indicates that some committee members have been paid for performing work at the NYC 2 Way base. For example, Albasir testified that after he became the Communications chair in February 1999, Slinin asked him to spend one day per week working on a "hot line phone" and performing other duties at the NYC 2 Way base. Albasir was paid $500 per week to do this work from April to June 1999. (Other forms of compensation to committee members will be discussed below, in a section describing the committees.)

Subsequent sales/transfers of franchises

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21 Petitioner witness Albasir gave a different account of this dispute over customer discounts. Albasir testified that, after the late August memo, drivers met with the Petitioner, and signed some kind of petition against having to absorb the customer discounts. The petition (which was not introduced into evidence) was submitted to Hussein. For some reason, Albasir did not testify about any meeting in September to discuss the discount issue, even though Hussein claimed that Albasir attended that meeting. Albasir claims that he was terminated by Slinin shortly thereafter. (The circumstances of Albasir's termination are discussed in more detail below, in a section regarding discipline and terminations.) In any event, for the purposes of this section describing the drivers' compensation, there appears to be no dispute

Franchisees may sell their franchises in one of three ways: to a third-party buyer, or to NYC 2 Way through a mechanism called the Radio Club, or to NYC 2 Way directly.

The franchise agreement states the following with regard to a franchisee's sale (or "transfer") of the franchise to a third party:

> The ownership of the Franchise is not assignable or sellable without prior written consent of the Franchisor [NYC 2 Way]. Upon any assignment or sale approved by Franchisor, Franchisee shall pay to the Franchisor a sum equal to 25% percent of the value of such assignment or sale. The failure to make this payment shall make the transfer or assignment invalid. In addition, Franchisee must pay to Franchisor ... a processing fee (approximately $500) for the expenses incurred by Franchisor in connection with the assignment.

Er. Ex. 2, pp. 3-4 of agreement. (*See also* pp. 12-13 of prospectus.) However, Hussein testified that these transfer provisions are not in effect. According to Hussein, if a franchisee-driver wants to sell his franchise to a third party, he does not need prior consent from NYC 2 Way, either written or verbal. Nevertheless, a new franchisee-driver who is buying the franchise must show NYC 2 Way his licenses (driver's license, TLC license, etc.) before he is entered into NYC 2 Way's records and computer dispatching system.[22] Furthermore, Hussein testified that NYC 2 Way does not require the 25% plus $500 figure as stated in the agreement. Rather, there is a flat $2,000 transfer fee paid to NYC 2 Way. In theory, either the buyer or seller could pay the transfer fee, but Hussein said that the buyer usually pays the $2,000 transfer fee in

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that NYC 2 Way has chosen, at times, to pass along at least part of the cost of customer discounts onto the drivers.

[22] Hussein claimed that there were a couple of buyers (unspecified) who bought franchises from existing franchisees as an "investment" only, without intending to become drivers themselves. In that case, Hussein said, the new franchisee-investor does not need to show licenses.

installments deducted from his paychecks (in addition to deductions for the $2,000 equipment deposit, franchise installment payments if any, and the other deductions).

Hussein testified that the transfer fee used to be $1,000 under the predecessor company, NYC 2 Way, Inc. In 1996, after the company became NYC 2 Way International, Inc., Slinin proposed to raise the transfer fee to $5,000. However, according to Hussein, he and Slinin discussed the proposed increase with certain driver committee members who thought $5,000 was too much, and Slinin agreed to increase it to $2,000. Hussein also stated that, at some unspecified time, the transfer fee was $2,500, but "the company made a decision" to change it to $2,000.[23]

According to a document prepared by Hussein, at least four franchises (numbers 97, 440, 297 and 282) were sold/transferred from a franchisee to a third party, from 1998 to the time of the hearing in February 2000 (Er. Ex. 39). Hussein stated that NYC 2 Way does not necessarily know the selling price of franchises sold to third parties, so he could not say whether those former franchisees made or lost money on those third-party sales.

NYC 2 Way has also bought franchises back from franchisees through a mechanism called the Radio Club. Franchisee-drivers are required to contribute 50¢ per voucher, up to a maximum of $1,000 per franchisee, to the Radio Club. In theory, given that NYC 2 Way has approximately 360 franchisees, the Radio Club contributions could amount to as much as $360,000. This money is commingled with NYC 2 Way's general funds, not kept in a separate account. There are no written rules governing the Radio

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23 Albasir testified that he tried to sell his franchise to Abu Ahamed in 1998, but the proposed sale fell through because Ahamed told him that Slinin said he would charge a $4,500 transfer fee. However, this is hearsay evidence. Albasir never talked directly to Slinin about the transfer fee, and Ahamed was not called to testify.

Club, and the franchise prospectus/agreement does not mention it. Hussein described the Radio Club as a "lottery" which enables franchisees to sell their franchises if they want to leave the business, in case they have trouble finding a third-party buyer. Of all the franchisees who have indicated that they want to sell, one is chosen by lottery. NYC 2 Way then uses part of the Radio Club money to buy back the franchise from that person for $15,000 or $20,000, depending on how quickly he wants to be paid (in either 12 or 36 monthly installments).[24] In other words, NYC 2 Way uses money collected *from the franchisees*, rather than its own revenues, to buy back franchises, which it can then turn around and sell for $32,000 to new franchisees. Hussein initially denied that NYC 2 Way really takes back "ownership" of the franchise or that NYC 2 Way makes a "profit" from re-selling the franchise to another person. He explained that NYC 2 Way could sell an unlimited number of franchises[25]; therefore that NYC 2 Way is really buying "nothing" back from the franchisee; and that NYC 2 Way is merely "ending its relation" with that particular franchisee. Upon further questioning by the Hearing Officer, Hussein conceded that NYC 2 Way has re-sold existing franchise numbers to other buyers, and that there is a "difference" in price between NYC 2 Way's purchase of the franchise for $15,000-$20,000 (using Radio Club contributions) and the sale for $32,000.

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[24] As an exception, one franchise was sold for $9,000 in 1999. Hussein explained that the franchisee (Car #358) was willing to sell his franchise for only $10,000 because he wanted to receive an immediate lump-sum payment before moving back to his country of origin. Slinin decided to offer $9,000, which the driver accepted.

[25] The franchise prospectus states that NYC 2 Way is "not required to limit the number of franchises sold" (Er. Ex. 2, unnumbered page entitled "risks factors to be considered").

Hussein initially testified that NYC 2 Way bought back 12 franchises in 1999 via the Radio Club (one per month), but Er. Ex. 39 indicates that NYC 2 Way repurchased only 8 franchises through the Radio Club in 1999, and 6 in 1998. When a franchisee leaves NYC 2 Way, he is supposed to get his Radio Club contributions (up to $1,000) back from the company. It should be noted, without describing all the details here, that there was a recent dispute regarding franchisees' receipt of interest payments on their accumulated Radio Club contributions.

NYC 2 Way has also bought franchises *directly* back from franchisees using its own money (i.e., not through the Radio Club). Er. Ex. 39 indicates that NYC 2 Way directly bought back one franchise in 1998, and two in 1999, at $5,000 each. Thus, the number of franchises that NYC 2 Way bought back in 1998 and 1999, both directly and through the Radio Club, came to a total of 17.

After selling or transferring a franchise, a seller is not prohibited from working for other car companies. (Er. Ex. 2, p. 13 of the prospectus states: "There are no covenants not to compete at this time.")

Lessee-drivers

As described above, drivers may choose to lease "radio rights" rather than becoming "franchisees." Currently, there are at least 110 lessee-drivers, including approximately 70 drivers who lease directly from NYC 2 Way and approximately 40 drivers who lease from individual franchise owners.

According to Er. Ex. 20 and Hussein's testimony, there are two incorporated franchise owners who own multiple franchises: Peter Transportation, Inc., owns seven franchises, and S & P Limo, Inc., owns two franchises. There are also eight individuals

who own multiple franchises: Hussein himself owns 12 franchises, and seven other individuals own two or three franchises each. These incorporated and individual owners of multiple franchises collectively represent 37 of the 40 franchises which are leased to lessee-drivers. There are also a few individual franchise owners (not specifically listed on Er. Ex. 20) who own only one franchise each, and who lease their radio rights to lessee-drivers, bringing the total to 40.

Although the record does not specifically indicate whether drivers who lease from individual franchise owners must be approved by NYC 2 Way, the record generally indicates that NYC 2 Way collects certain information regarding all drivers (e.g., copies of required licenses) for both its paper files and its computer records.

Lessee-drivers do not pay for a "franchise" but, rather, they pay $110 per week in lease payments which are deducted from their earnings. Whether a driver leases directly from NYC 2 Way or from an individual franchise owner, the lease payment is never more than $110.[26] Presumably, lessee-drivers are not required to make Radio Club contributions. However, all the other deductions are the same as the franchisees' deductions, including installment payments for the initial $2,000 equipment deposit,[27] the 17.5% or 22% commission or service fee, the weekly radio dues, and the dollar-per-voucher fee.

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26 It is not clear from the record why individual franchise owners would not be free to negotiate a higher lease payment than $110 per week, since the lease is presumably a matter between the franchisee and the lessee.

27 Although Hussein initially stated that the equipment deposit was $3,000 (Tr. 204), it is obvious from the record that he meant to say $2,000. For, example, on p. 204, he said that a driver making a $500 deposit would pay a balance of $1,500. *See also* his testimony at Tr. 730-1 explaining the lease agreement form.

Lessee-drivers use the same equipment as franchisee-drivers, attend the same training classes, submit the same vouchers, are subject to the same rules, and are dispatched under the same system.

When a driver leases from an individual franchise owner, NYC 2 Way does not get the lease payments, but it still gets the commissions, radio dues and per-voucher fees. As for the lease payments, various arrangements are possible as between the three parties (NYC 2 Way, the franchise owner and the lessee). For example, NYC 2 Way could remit the lease-payment portion to the franchise owner, while remitting the remaining portion directly to the lessee. In that scenario, NYC 2 Way would cut two different checks. Hussein himself, who owns 12 franchises, and leases radio rights to 12 drivers, stated that NYC 2 Way deducts the $110 per week lease payments from the drivers' earnings, and remits those lease payments to Hussein, while remitting the remainder directly to the lessee-drivers. Alternatively, a franchise owner may choose to have NYC 2 Way make the *entire* payment to himself. In that scenario, NYC 2 Way would cut only one check. The franchise owner would keep the lease payment portion, and remit the remaining earnings to the lessee. Hussein testified that Peter (last name unknown) who owns seven franchises under the name "Peter Transportation, Inc." receives all the earnings from NYC 2 Way, and then issues checks to the seven lessee-drivers. According to Er. Ex. 20, of the 40 drivers leasing from individual franchise owners, nine involve payments entirely to the franchise owner (apparently, Peter and two others). Finally, it appears that NYC 2 Way could pay the entire amount directly to the lessee, with the understanding that the lessee will turn over the lease payment to the franchise owner. Hussein testified

that a franchise owner (not identified) once called to ask NYC 2 Way to take his lessee "off the air" because the lessee was not making the lease payments to him.

Hussein stated that there is no written agreement between himself and his lessees; they simply "shake hands." Nevertheless, there is one-page "radio lease agreement" form (Er. Ex. 24) which *inter alia* authorizes NYC 2 Way to deduct the lease payments from the drivers' paychecks.

If a lessee-driver decides to put his radio "on the shelf" temporarily, no lease payments are deducted during that time. Lessee-drivers may permanently terminate the relationship with NYC 2 Way at any time. Up to $1,500 of the $2,000 equipment deposit will be returned to them. As indicated on Er. Ex. 24, the refundable and non-refundable portions of the equipment deposit used to be $1,750 and $250, respectively. However, Hussein testified that Slinin decided in 1988 to change those amounts to $1,500 and $500.

NYC 2 Way's revenues

According to a financial statement appended to the franchise prospectus (Er. Ex. 2), NYC 2 Way had approximately $27 million in revenues in 1998, and $24 million in 1997. During the hearing, NYC 2 Way was asked to compile a break-down of its revenues from various sources. Hussein prepared Er. Ex. 20(a), which purports to show the percentages of all sources of income. Unfortunately, the document makes little sense because it mixes types of "income" (commissions, dues, service fees, franchise payments, lease payments and Radio Club payments received by NYC 2 Way, totaling 27.7% for 1998) with "costs" (payments which NYC 2 Way made to drivers, indicated as 72% for 1998), to arrive at a total of 99.7%. From the nature of the business, it is obvious that

most, if not all, of NYC 2 Way's income comes from its corporate customers, i.e., what they have paid via the voucher system for the transportation services they received, yet such income is not listed in Er. Ex. 20(a). On cross examination, Hussein conceded that all of NYC 2 Way's income (for example, the $27 million in 1998) is generated "as a result" of the drivers' work -- in other words, based on the customers' payment for transportation services. NYC 2 Way has no significant income from any other sources, such as interest on investments. Hussein tried to explain that if you divide NYC 2 Way's payments to drivers ($21 million) by the total revenues ($27 million) for 1998, you get the "72%" figure (actually, it is 78%), whereas the remaining "28%" (actually, it is 22%) represents the portion of revenues which NYC 2 Way retains to cover other costs (rent, advertisement, computers, payroll for office employees, dispatchers and management, etc.), income taxes and, finally, the company's profit. Thus, by extrapolating information from both the financial statement (in Er. Ex. 2) and Hussein's list of percentages (Er. Ex. 20(a)) and his testimony (Tr. 1668-72), it appears that although 100% of NYC 2 Way's revenues comes to NYC 2 Way in the form of the corporate customers' voucher payments, 22-28% represents the commissions, per-voucher fees, radio dues, franchise payments, lease payments and Radio Club payments retained by NYC 2 Way (in the form of "deductions" from the driver's paychecks), and the remaining 72-78% represents the net portion paid to drivers in their paychecks.

As noted above, NYC 2 Way sets the rates with its customers, and decides whether to offer discounts to customers and whether to pass the cost of any discount on to the drivers. Drivers do not negotiate fares with the customers.

When drivers decide not to work (e.g., when they put their radio "on the shelf" during a vacation), they do not submit vouchers and they do not have any deductions made whatsoever.[28] In that sense, all of NYC 2 Way's revenues ultimately depend on drivers' actually collecting fares during a given week. However, within the various types of deductions, some are flat weekly fees (radio dues, franchise payments and lease payments) that do not vary with the number of fares, whereas other deductions (commissions, per-voucher fees and Radio Club payments) specifically depend on the number of fares the driver actually works within that week.

Assignment of jobs, dispatching system

There are various ways for customers to initiate contact with NYC 2 Way for the purpose of obtaining a car. Typically, customers call by telephone, either to request a car immediately or to make a reservation in advance (especially for out-of-town and airport jobs). In that case, customers talk to one of 30 "call takers" employed by NYC 2 Way at its dispatch base in Brooklyn, to communicate all the relevant information (including the corporate account number, pickup location, destination and any special requests such as a no-smoking car). NYC 2 Way also employs 6 dispatchers and 6 operators at its Brooklyn base. Second, NYC 2 Way also participates in "lines" at five customer locations in Manhattan, where drivers from various black-car companies line up and are assigned on a first-come-first-served basis. For example, there is a line at 60 Wall Street for J.P. Morgan employees. Third, NYC 2 Way also participates in a joint venture, called 85

[28] Sometimes, if NYC 2 Way is running short on equipment, it gives equipment left by one driver to another driver to use in the interim. It is not clear from the record whether the second driver pays any kind of security deposit, or whether the first driver is still accountable for the equipment via his security deposit even while another driver is using it.

Broad Corp., with three other black-car companies, to provide dispatching and transportation services to Goldman Sachs at its 85 Broad Street location. There is a dispatcher there, employed by 85 Broad Corp., who divides the assignments evenly among the four companies. Dispatching information is communicated between 85 Broad Corp., NYC 2 Way and the other three car companies' dispatching systems via special data links. Customers may also request cars from NYC 2 Way via the internet and via a new computerized telephone-answering system. Finally, as described above, customers can arrange in advance to have a specified number of cars available for special events, such as a holiday party.

NYC 2 Way does not schedule drivers to work according to any particular schedule, and does not require any minimum number of work hours per week. When a driver decides to work, he signs on to NYC 2 Way's computer dispatch system by entering his identification number and certain other information using the computer keyboard/screen in his car. Then he must book himself into the geographical zone from which he wants to accept an available job. NYC 2 Way does not require drivers to book into any particular zone, or assign drivers by particular geographical areas. When a driver books into a zone, he is placed at the bottom of the waiting list of drivers booked into that zone, and waits for his turn to accept a job. Jobs are generally dispatched to drivers in the order of the zone's waiting list, with certain exceptions noted below.

After the driver moves to the top of the waiting list, NYC 2 Way's dispatching system offers him a job. Specifically, a message appears on the screen saying "please accept job." If the driver wants to accept the job, he enters a certain code and gives an estimated arrival time ("ETA"). According to Hussein, after the driver accepts the job, he

receives more detailed information, including the customer's pickup location and destination.[29] As the job progresses, the driver must keep the dispatching system informed of his location and status by entering various codes. For example, Code 3 indicates that the driver is "circling" around the pickup point, if the customer is not there yet and it is a no-parking zone. That way, if the customer calls to find out where the driver is, the dispatcher can respond that the driver is circling the block and will be there shortly. Other codes indicate that the driver has arrived at the pickup location (Code 2), picked up the customer (Code 0), dropped off the customer (Code 1) and so forth. Information regarding each job is stored in NYC 2 Way's computer for at least a month, in case there is any subsequent dispute regarding the driver's actions or the customer's voucher or bill.

If a driver fails to accept or complete a job that is offered to him, NYC 2 Way's dispatching system automatically books the driver "off" of the zone. As a result, the driver has to book into a zone again at the bottom of the waiting list. Specifically, drivers are booked off their zone if they *reject* a job that has been offered to them (by pressing the reject code) or if they *forfeit* the job (by failing to respond to the offer within 90 seconds). Although the NYC 2 Way rule book lists rejecting a job and forfeiting a job as "security offenses" punishable by fines of $100 and $150, respectively (Er. Ex. 3, p. 37), Zabib testified that such fines are no longer imposed. An attempt to *bail out* of a job that has already been accepted also results in going to the bottom of the list, but the procedure is more complicated. Hussein explained that drivers are allowed to bail out of a

[29] It is not clear from record how the driver could give an estimated time of arrival if he does not yet know the pickup location.

previously-accepted job for a "legitimate" reason (such as discovering a flat tire), but they are not

allowed simply to change their mind about accepting a job (for example, if they do not want to go to the customer's desired destination). Thus, a driver who wants to bail out of a previously-accepted job must contact the dispatcher by radio to explain the circumstances. The dispatcher may need to dispatch someone else to do the job and, if there has been an accident, may also need to send help. If a driver is later found to have given a pretextual reason for bailing out, he may be subject to discipline.[30] In any event, any driver who bails out of a job is automatically booked off the zone, forcing him to the bottom of the list if he books in again. According to the dispatch manual, a driver who bails out will be taken off the air for three hours (Er. Ex. 15, p. 24), but Hussein testified that that penalty is no longer in effect.

A driver who is booked into a zone and waiting for a job can take a break of up to 15 minutes without losing his place on the waiting list. To do this, he must press code 16 to indicate "on break." (If he left his car without indicating "on break," and a job was offered to him in the meantime, he would risk forfeiting the job by failing to respond within 90 seconds and then have to go to bottom of the list again.) Driver Bhatti testified that NYC 2 Way allows only one break every two hours.[31] Specifically, he recalled the following incident during the week before his testimony. He booked into Zone 1 in Manhattan, where he was somewhere between 25th and 30th driver on the list for that zone. At approximately 7:00 or 7:30 p.m., he pressed code 16 and his computer screen

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30 The disciplinary system is described in more detail below.

31 According to the dispatch manual, a break is allowed once every three hours (Er. Ex. 15, p. 21).

indicated "on break." After returning from a 15-minute break, Bhatti later got a fare from that zone and drove the passenger to his/her destination. He then booked into Zone 4 in Manhattan, at the bottom of the waiting list. However, when he repeatedly tried to press code 16 again (less than two hours later), the computer would not indicate "on break." Bhatti claimed that this had happened to him once or twice in early 2000.

Drivers must wait until they have dropped off the passenger before they can book into a zone again. If a driver falsely indicates that he has dropped off a passenger by pressing Code 1 in order to book into the next zone prematurely while he is actually still en route with the passenger, he could be subject to discipline.

A driver can book himself into only one zone at a time. Nevertheless, a driver who waits in one of the lines, such as the J.P. Morgan line at 60 Wall Street, may also book into a zone. In that circumstance, he is essentially waiting in two sequences at once. The driver then takes whichever job comes first, and forfeits his chance for the other.

Under certain circumstances, a driver can also "conditionally" book himself into a second zone without losing his place in the first zone's waiting list. Specifically, if a customer wants to be picked up in a zone in which no NYC 2 Way drivers are currently booked, NYC 2 Way sends a computer message to drivers, essentially inviting them to bid for the job. Drivers can conditionally book into that zone. The job will be dispatched to the first driver who responds; the other drivers who responded do not lose their previous places on other zones' waiting lists.

When a customer calls in advance to reserve an out-of-town pickup, drivers may bid for the job. Assuming bids from more than one car number, NYC 2 Way uses a

"digit" program to dispatch the job. Hussein explained that the "digit" program, part of the Aleph computer program used by NYC 2 Way and other black-car companies, uses random numbers in order to assign the jobs fairly among drivers.

It is undisputed that NYC 2 Way does not always follow a strict first-come-first-served basis or random basis for assigning jobs to drivers, although the parties dispute whether NYC 2 Way's discretion is legitimately used to accommodate customer preferences or is unfairly used in the service of favoritism. Former driver and Communications chair Fares Albasir testified that NYC 2 Way management and dispatchers improperly used to "feed" jobs to certain drivers outside the dispatching system. For example, Albasir claimed that, one time in June 1999, he saw computer printouts showing jobs (including a lucrative fare to Southhampton) assigned to car numbers that were higher than #500, even though NYC 2 Way car numbers do not exceed 499. When Albasir confronted Eddie Slinin about these jobs, Slinin claimed that they were special jobs requiring stretch limousines although, to Albasir's knowledge, none of the drivers involved owned limousines. (Albasir also testified about other examples, but they were essentially based on hearsay.) In any event, there is no dispute that NYC 2 Way retains discretion to assign jobs based on factors other than the sequence of drivers' booking into zones and the random "digit" program. Although the franchise agreement provides that "radio calls will be assigned in an evenly distributed manner," it also explicitly reserves NYC 2 Way's right to assign jobs based on such factors as the drivers' experience, the vehicles' appearance and the customers' preference (Er. Ex. 2, Section 29 of the agreement). Hussein conceded that NYC 2 Way sometimes selects drivers for particular jobs outside the normal dispatch system. For example, one

customer in the television industry insisted on very specific criteria, including new cars and drivers who know how to get "everywhere." NYC 2 Way's customer service department asked the dispatchers to devise a list of vehicles/drivers who met the criteria, and the dispatchers then used the list to assign jobs for that customer. As another example, Hussein explained that if the senior vice president of J.P. Morgan needs a car on a rainy day, and NYC 2 Way does not want to keep him waiting, NYC 2 Way may call certain drivers' cell phones to determine who could get to that important customer immediately. Although NYC 2 Way does not officially "grade" or classify drivers by quality, Hussein stated that some drivers are more suitable for certain jobs than others, and that those determinations are made by NYC 2 Way's customer service employees, sales employees, dispatch managers and Slinin.

Certain customer requests can be programmed into the computer dispatching system. For example, Hussein explained that, since J.P. Morgan does not want white cars, NYC 2 Way's computer is programmed automatically to skip over any white cars in the zone waiting list when dispatching jobs for that particular customer. Hussein also pointed out that drivers, in turn, can ask to be taken off of particular customer accounts. For example, if a driver wants to avoid a certain customer who usually makes short, low-fare trips, he can ask NYC 2 Way to enter that information into the computer, so that the dispatch system will not assign that customer to that driver.

Other rules governing job assignments (including zone limits and no-shows) are discussed below in connection with the Communications Committee.

Operations of drivers' committees

There are four committees currently in existence at NYC 2 Way: Communications, Security, Appeals and Sunshine. Each committee is composed of drivers. A chairperson for each committee is elected at an annual meeting in February, and then each chair appoints a co-chair and other committee members. As discussed below in more detail, NYC 2 Way's witnesses Hussein and Zabib generally claimed that committee chairs and members are freely elected by drivers and appointed without interference from NYC 2 Way management, whereas Petitioner witness Albasir claimed that NYC 2 Way management interferes with and controls the elections and appointments. The record does not indicate how or when these committees initially originated; there are no written rules or by-laws regarding the election or appointment of committee members.[32]

NYC 2-Way waives the payment of radio dues ($44 per week) for committee chairs and members. Some committee chairs and members also receive other financial benefits, although the practice does not appear to be entirely consistent. For example, Zabib[33] testified that he and other Security Committee members receive $50 for each Security meeting they attend (usually 3 or 4 meetings per month),[34] whereas Albasir testified that Communications Committee members did not get paid for attending meetings while he was chair. The testimony of Zabib and general manager Hussein was

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32 The NYC 2 Way Rules and Regulations Manual contains some references to the committees' operations (Er. Ex. 3, pp. 35-40), but does not address the election and appointment of members.

33 Zabib was a member of the Security Committee for two years from 1995 to 1997, then Chair of the Security Committee for one year, from early 1997 to early 1998. Since mid-1998 and continuing until the time of the hearing, he served as Security co-chair.

34 Checks to committee chairs come from the so-called Sunshine fund, a separate bank account for which Slinin is the only signatory, and which is described in more detail below.

contradictory regarding the extent to which Zabib received other payments for security-related work. Zabib himself only mentioned the $50 per meeting payment and the waiver of $44 radio dues per week. Zabib denied receiving any payment for the 3 to 4 hours per week of "quality control" work (e.g., checking the drivers' vouchers) which he performs at NYC 2-Way's base. Employer Exhibit 40(a) shows that, in 1997 when Zabib was Security chair, he received more than 30 checks for $350 for security meetings, more than 40 checks for $200 for "security work," plus two checks for $250 each for "inspections," totaling more than $20,000.[35] Hussein initially explained that the $350 checks were supposed to be distributed by Zabib to all the Security Committee members for attending meetings (i.e., $50 each for up to seven members), although Hussein acknowledged not knowing whether Zabib actually did so. Hussein also explained that the $200 checks for security work compensated Zabib for his time spent performing other security-related duties, such as investigating customer complaints, printing related information from NYC 2-Way's computer system, and inspecting drivers' cars (Tr. 1621-6, 1651). However, Hussein subsequently testified that the $200 checks were only for attending Security Committee meetings, and that Zabib is not compensated for quality control work and the like (Tr. 1812). The record also seems to indicate that NYC 2-Way gives committee members opportunities to make additional money, such as Zabib's on-site dispatching for holiday parties (which allows him to assign the most lucrative fare to himself), or Albasir's work at NYC 2 Way's base while he was Communications chair. (Albasir was paid $500 per week from April to June 1999, during which time he drove only once per week.)

35 These payments do not include the $100 payments Zabib receives for training new drivers.

Election of chairpersons and appointment of members

There seems to be no dispute that an annual election meeting is usually held in late February at a restaurant in Brooklyn. However, as of the hearing date on February 24, 2000, the election meeting had not yet been scheduled for some reason. Hussein claimed that the Security chairperson (Car 345, Mohammed Kamnaksh) is supposed to schedule the election meeting, but that he had not yet selected a specific date. There seems to be no dispute that, once a date is selected, NYC 2 Way sends a computer message and/or a paper memorandum to drivers, announcing the date of the election meeting and instructing drivers who want to run for a chair position to notify NYC 2 Way management by a certain deadline.

There is no dispute that members of NYC 2 Way management, including Hussein and Slinin, attend the election meeting and address the drivers, although they do not actually vote in the election. According to Albasir, if only one candidate has indicated interest in a particular chair position, Hussein announces that the position is uncontested, and therefore that there is no need for an election for that position. For example, during the previous three years (1997, 1998 and 1999), the Security chair position was uncontested, but the Communications chair position required choosing from among more than one candidate. According to Zabib, in contested elections, "whoever [is] holding the election" (unspecified) allows each candidate to speak to drivers for 5 to 10 minutes. Although there is no dispute that some sort of paper ballots are used in contested elections, the witnesses differed as to other mechanics of election. Hussein and Zabib generally testified that drivers hand out and count the ballots, whereas Albasir testified that NYC 2 Way management does so.

Specifically, Albasir testified that, in early 1997, two candidates, Car 102 and Car 126, ran for the Communications chair position. Before the election, Car 102 and Albasir went to Slinin's office, to complain about drivers' having "jobs on the side" (apparently referring to private bookings of NYC 2 Way customers). According to Albasir, this conversation became very heated, and Slinin cursed at Car 102. At the election itself, after Slinin prepared some kind of paper ballot, Slinin allegedly stood at the voting table and told drivers to vote for the other candidate, Car 126. Albasir, who speaks Russian, claims that Slinin told him in Russian to vote for Car 126 and that, after he did so, Slinin said he did a "good job." Car 126 won the election.

Albasir also testified that NYC 2 Way management tried to control the election in 1999, when Albasir and three other candidates vied for the Communications chair position. According to Albasir, NYC 2-Way had promised to pay franchisee-drivers a sum of $40, which was supposed to represent interest on their accumulated Radio Club contributions.[36] At the election meeting, which Slinin, Hussein and Rutenberg attended, NYC 2-Way management distributed checks that were apparently for less than $40, and Albasir complained. Albasir claimed that "he" (it was not clear whether he referred to Slinin, Hussein or Rutenberg) said if Albasir did not like it, "he" would throw Albasir out and stop the election. At some point during the meeting, Albasir and two other drivers (Cars 453 and 21, whom he described as supporters of the Petitioner) insisted that drivers, not management, must be allowed to run the election. Volunteers were solicited for an "election committee" (Car numbers 15, 70 and 193), and Hussein agreed to let those volunteers monitor the election and count the ballots. According to Albasir, a

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36 The Radio Club is described supra at pp. 21-2.

problem later arose when the election committee approached a group of 24 Russian drivers sitting at a table, and that group allegedly tried to submit 40 ballots. Consequently, the voting
had to be done again. The second time, the election committee somehow managed to collect no more than one ballot from each driver. Albasir won the election for Communications chair.

Both Hussein and Zabib testified that each committee chair selects a co-chair and other members, without interference from NYC 2 Way management. By contrast, Albasir testified that, after the memo announcing the 1999 election, NYC 2 Way issued a second memo stating that it would appoint half the committee members that year. Hussein denied that NYC 2 Way management made any such statement, and Albasir did not have any copy of the memo. In any event, Albasir further testified that he (as Communications chair candidate) and Car 21 (as Sunshine chair candidate) complained about the second memo to Hussein, but Hussein again insisted that management would appoint half the committee members this time. According to Albasir, after he won the election for Communications chair, management did not in fact attempt to appoint half the committee. Nevertheless, after Albasir submitted his list of members, NYC 2 Way continued to charge those drivers radio dues. Albasir then complained to Joseph Asachi in the franchise sales office in March 1999, who referred him to comptroller Ron Karp, who told Albasir to wait until Slinin returned from vacation. According to Albasir, Karp said that radio dues could not be waived without Slinin's approval. After Slinin returned, Albasir and Car 21 reportedly went to talk to Slinin and Hussein, who complained that some of the proposed appointees were "no good." Nevertheless, NYC 2 Way finally

stopped charging radio dues to those drivers, and retroactively issued reimbursements for some dues they had paid since Albasir submitted the list.

Albasir also testified that a few months later, in June 1999, NYC 2 Way management resisted his attempts to replace a Communications committee member with a new member, Car 193. When Albasir complained to Karp that the company continued to deduct Car 193's radio dues, Karp responded that "Eddie [Slinin] doesn't want this guy, so you have to speak to Eddie, and if Eddie told me to waive his dues, I will do it." According to Albasir, Slinin later said that Car 193 was a bad driver with too many bailouts, and that there was "no way" Car 193 would be on the committee. It is not clear from Albasir's testimony whether NYC 2 Way ever allowed Car 193 to join the committee, but Car 193 does not appear on the list of members as of February 2000 (Er. Ex. 16). Slinin did not testify in this proceeding, but Hussein testified that he did not recall any controversy regarding Car 193's appointment to the Communications Committee.

Communications Committee

The Communications Committee, which apparently has 6 to 10 members, meets occasionally at the NYC 2 Way base in Brooklyn. According to Hussein, the Communications Committee's purpose is to make and help enforce rules governing the drivers' conduct. Hussein claims that Communications members also helped to draft those written rules although, as described above in connection with the Rules and Regulations Manual (see discussion of Er. Ex. 3, supra at pp. 12-16), the record as a whole raises doubts regarding the manual's origin. In addition, both Hussein and Zabib testified that if Communications members see drivers committing a violation, they can

bring it to the attention of the Security Committee, whose role is to investigate and recommend or impose penalties for alleged violations. Specifically, Communications Committee members may issue a "security slip" to allege a violation.[37]

Albasir agreed that the Communications Committee is supposed to propose rules governing drivers conduct, and that its members may issue security slips. However, as noted above, he disputed that the Committee actually used the written manual as a source of rules. More significantly, Albasir disputed that the Communications Committee had authority to do anything other than *propose* rules, which NYC 2 Way management could choose to accept or reject. Albasir gave several specific examples of rules that he proposed as Communications chair in 1999, only some of which management implemented.

On one hand, there is no dispute that the Communications Committee under Albasir persuaded NYC 2 Way management to change a practice of "chasing" drivers from other zones across Manhattan. In the past, if a customer needed to be picked up on one side of Manhattan (east or west) but no driver was booked into that zone, NYC 2 Way would "chase" a driver from a cross-town zone. If the driver did not accept the cross-town job, it would be considered a "forfeit" and the driver would be booked off his original zone, and put on the bottom of the list when he booked in again. Apparently, drivers did not like the east-west chasing because they would frequently get stuck in cross-town traffic. In approximately April 1999, the Communications Committee asked NYC 2 Way management to stop the practice of cross-town chasing, and management agreed. Since then, the company has used certain north-south backup zones in

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37 *See* Er. Ex. 25, a blank copy of the "security slip" form. No copies of any security slips that were

Manhattan. For example, if a customer needs to be picked up in the Upper East Side but no drivers are booked into that zone, the dispatcher may "chase" a driver from the midtown east zone.

On the other hand, Albasir testified that in 1999 the Communications Committee was not able to change the rules regarding drivers' "private booking" of NYC 2 Way customers. As background, it should be noted that the Rules and Regulations Manual states: "Soliciting any NYC customer as your customer is a serious breach of the Franchise Agreement," and specifies a $1,000 fine for booking a customer (Er. Ex. 3, pp. 6 and 39). The franchise agreement itself states that "attempting to directly or indirectly cause any customer of Franchisor to use the services of any business in competition with Franchisor" is a "material breach of contract," which could result in termination of the franchise agreement (Er. Ex. 2, section 44.20). However, there is no dispute that some drivers make private arrangements with NYC 2 Way customers. Specifically, some drivers have distributed their cell phone or beeper numbers, so that NYC 2 Way customers can contact them directly to pick up passengers or packages, outside the usual dispatching system. Hussein testified that the rules against this practice are not enforced. Employer witnesses Zabib and Mohammed Shah both testified that they engage in private booking. Zabib stated that he has 7 or 8 J.P. Morgan employees who contact him directly for pickup, without going through the NYC 2 Way dispatching system. When Zabib submits vouchers for those trips, the vouchers do not indicate a dispatch number, but NYC 2 Way pays him for those trips nevertheless (minus the usual commissions and fees). Zabib claimed that as much as 20% of his income comes from private bookings of

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actually filled out and submitted by Communications Committee members were introduced into evidence.

NYC 2 Way customers. (Zabib refused to identify these customers by name and, despite a request from the Hearing Officer, did not submit copies of any vouchers or cancelled checks to substantiate his testimony, nor a copy of the business card which Zabib allegedly uses.) Similarly, Shah claimed to earn more than $15,000 per year from private bookings of employees of J.P. Morgan, Goldman Sachs and other NYC 2 Way customers, by submitting dispatch-less vouchers. Although Albasir himself admitted to having privately booked some customers, he testified that he nevertheless tried to stop the practice while he was Communications chair because he thought it unfair to bypass the dispatching system, which is supposed to distribute jobs "evenly" among all drivers. Albasir testified that he tried issuing security slips against some drivers who did private bookings but, to his knowledge, no one was ever disciplined for violating this rule. Albasir also testified that he, Car 453 (Communications member) and Car 21 (Sunshine chair) met with Slinin, to ask management to enforce the rules against private booking. Slinin allegedly refused, claiming that only certain drivers could be trusted to handle "VIP" customers. Albasir responded that private booking should therefore be made expressly available to *all* drivers, but Slinin refused that idea as well. According to Albasir, Slinin called the idea "crazy," since NYC 2 Way could never attract new drivers if they knew all the good jobs had already been booked outside the dispatch system. In short, Albasir asserts that the Communications chair's attempts to enforce the rule against private bookings, or to eliminate it completely, were not successful.[38]

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38 Zabib testified that he recalled Albasir discussing this issue at a Communications meeting in 1999. Zabib generally corroborated the testimony that Albasir was unsuccessful in changing the practice of private bookings, although Zabib did not know why he was unsuccessful.

Albasir also testified that he as Communications Chair was unable to change the rules regarding "no shows," that is, whether drivers are paid for being dispatched to a job where the customer does not show up. As background, it should be noted that NYC 2 Way's contracts with its customers specifies that customers will be charged for no-shows. (*See, e.g.*, Er. Ex. 6(a), p.8.) Zabib explained generally that, when a driver cannot find the customer at the pick-up location, he must contact a dispatcher at the base. The base attempts to contact the customer to find out what happened (i.e., whether the customer still wants a car, whether there was a misunderstanding over the pick-up location, etc.). The driver cannot leave the site until the dispatcher authorizes him to do so. If the dispatcher confirms that the customer has not shown up after a certain amount of time, he may release the driver and charge the customer for a no-show. The driver will initially be paid for this job, but if the customer later refuses to pay for the no-show on its bill (e.g., if the customer claims that the driver was late), the fare will automatically be deducted ("charged back") from the driver's subsequent paycheck. The rules manual informs drivers of the following rules: "If the customer refuses to pay any no show, it will be charged back to you. If you feel you deserve payment, in case of charge back, see Franchise Officer" (Er. Ex. 3, p. 17). Hussein explained that, when customers refuse to pay for a no-show, disputes frequently arise over who was at fault. If NYC 2Way cannot persuade the customer to pay, the company could either choose to "swallow" the cost of the no-show itself (as a cost of keeping the customer happy), or could pass the cost along to the driver. Albasir testified that whenever he tried to dispute a no-show charge-back, he had problems with dispatch manager Kathy Nicholson.[39] According to Albasir,

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39 Although Albasir's testimony was not clear, he testified that Nicholson said "I don't have time for

Nicholson never "gave" drivers a no-show. In 1997 and 1998, NYC 2-Way management issued memos to drivers (Pet. Exs. 3 and 5), essentially assuring drivers that they would be paid for no-shows. Nevertheless, as Hussein conceded, drivers continue to be charged back for no-shows if NYC 2 Way believes that the driver was at fault. Thus, Albasir claims that after he was elected Communications Chair in early 1999, the Communications Committee met with Hussein and insisted that NYC 2 Way pay for no-shows. According to Albasir, Hussein agreed in theory, but in reality drivers continued to be charged back when customers refused to pay for no shows, and the Communications Committee was not able to change the practice.

Albasir gave other examples of the Communications Committee's inability to change rules governing the drivers, described briefly here. According to Albasir, the Communications Committee proposed that NYC 2 Way's computer dispatches specify the pickup location at Newark Airport (e.g., arrivals, departures, parking area), to help drivers find the customers, but NYC 2 Way declined. Similarly, the Communications Committee proposed that dispatches include the zip code for pickup locations, to eliminate confusion between towns with identical or similar names, but Hussein complained that this would cost the company money. In late March 1999, the Communications Committee succeeded in changing a rule regarding airport "checkpoints," but a few months later Slinin decided to change it back.[40] According to

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it" (Tr. 1968) and refused to "print" the no-show (Tr. 2075), presumably referring to computer records which would have shown such information as the driver's time of arrival.

40 The record is unclear as to whether drivers must be physically located in a zone when they book into it. The rules manual clearly requires drivers to be in the zone (Er. Ex. 3, Section 6.1), but Hussein and Zabib testified that this rule is no longer in effect. Nevertheless, it appears that, at least during some time periods, drivers were required to be physically located at an airport before they could book into that zone (as opposed to booking in from home if the driver happened to live near the airport, or booking in when the driver was still en route to the airport from a previous fare). In order to enforce this rule, NYC 2 Way used

Albasir, Slinin repeatedly stated that NYC 2 Way was his company, and that nobody was going to tell him what to do with the company.

The issue of whether the Communications Committee controlled zone limits, cited by both parties in their briefs, is not as clear as the parties each contend. There used to be a maximum number of drivers that could book into the airport zones, in order to avoid having too many drivers waiting in those zones (and not enough drivers available in other zones like Manhattan). When the "zone limit" was 10 drivers for Newark Airport, NYC 2 Way's computer dispatching system was programmed to prevent more than 10 drivers from booking into that zone at a time. In the parties' briefs, the Employer claims that the Communications Committee eliminated the airport zone limits, whereas the Petitioner claims that the airport zone limits are actually still in effect. What the record specifically shows is the following. Hussein testified that, in late 1999, the "Communications Committee" told him to reprogram the computer so as to eliminate the zone limits. However, Hussein said he could not recall specifically who it was who told him. Zabib also testified that the Communications Committee eliminated the zone limits in late 1999, but the Hearing officer later struck the testimony from the record because Zabib provided no basis for that knowledge, other than that he was "told" that the

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to conduct "airport checkpoints" on occasion. Specifically, the computer screen would suddenly instruct all drivers booked into a certain airport zone to meet at a certain location within a certain number of minutes, essentially to test the drivers' proximity. Albasir testified that in March 1999, the Communications Committee discussed new rules with Hussein and Nicholson. The parties agreed to eliminate the "checkpoints." However, they also agreed that if a driver who is booked into an airport zone subsequently *forfeits* a job by not responding in time, he would be fined $50 and prohibited from going back on the list for a certain amount of time (unspecified). However, according to Albasir, in approximately July 1999, NYC 2 Way issued a fleet message to drivers that airport checkpoints would be reinstituted. When Albasir asked Nicholson about this, she responded that Slinin decided to reinstitute the checkpoints. Later, when Albasir also confronted Hussein about this issue, Hussein agreed to suspend the checkpoints again. According to Albasir, the checkpoints were in fact suspended July 1999 until he left the company in September 1999, although he presented hearsay evidence that the checkpoints were then reinstituted again after he left.

Communications Committee had made the decision. Thus, both Hussein and Zabib claimed that no zone limits were in effect at the time of the hearing, but their testimony does not establish that the Communications Committee made that decision. By contrast, Petitioner witness Bhatti testified that the zone limits *were* in effect at the time of the hearing. Specifically, Bhatti said that there were occasions in early 2000 (including the week before his testimony) when he tried to book into the LaGuardia and John F. Kennedy airport zones, but the computer dispatch screen indicated "zone full." (Bhatti did not state *who* decided to reinstitute the airport zone limits, and Albasir did not testify on this issue at all.) In short, despite the parties' conflicting contentions, the record does not clearly show whether any airport zone limits were in effect, and if so, who made the decision.

Similarly, the Communications Committee's ability to change the use of "Code 35" was unclear from the record. Code 35 was originally intended to help drivers who lost a potential job assignment because of a technical dispatching difficulty. Specifically, if a driver waited his turn on a zone list, but for some reason the dispatch was not transmitted properly, he could press Code 35 to be put on top of the list again, rather than be considered a forfeit. However, according to Albasir, dispatchers used to engage in favoritism by falsely claiming Code 35 as an excuse to put certain drivers at the top of lists. Albasir testified that the Communications Committee tried in March 1999 to eliminate the use of Code 35, because many drivers had complained to him about it. At least initially, Albasir conceded that the Committee was successful: Slinin and Hussein agreed to change Code 35, and Nicholson told the dispatchers no longer to allow Code 35. However, Albasir also testified that the new rule was not always obeyed by

dispatchers. Albasir claimed that when he worked at the NYC 2 Way base in mid-1999, he frequently saw dispatchers "code" drivers back to the top of a list, and that other drivers continued to complain to him about it. In sum, the testimony suggests that the Communications Committee was not entirely successful in changing the Code 35 rule.

Finally, there was disputed evidence as to whether NYC 2 Way management or the Communications Committee controls the dress code. The NYC 2 Way franchise agreement requires that drivers "at all times strictly adhere to the dress code set forth by the Franchisee Communications Committee" (Er. Ex. 2, Section 8), apparently referring to the dress code in the Rules manual which committee members allegedly wrote (Er. Ex. 3, Sections 4.2 - 4.5). Zabib testified that the Communications Committee enforces the dress code, for example, by issuing a security slip if it saw a driver on duty wearing a baseball jacket rather than the required suit jacket. However, Albasir testified that NYC 2 Way management controlled the dress code. For example, even though the Rules manual allows a blue or white dress shirt, management issued a memo announcing that only white shirts were allowed, and threatening to fines drivers $200 for not wearing a white shirt. Even one time when the Committee sent a memo to drivers instructing them to wear a white shirt, Albasir said it was Slinin who initiated it because Slinin thought the drivers did not look good. According to Albasir, Slinin complained that drivers did not watch the dress code, and that the Communications Committee had to enforce it.

Security Committee

The Security Committee, with approximately 4 to 7 members, is supposed to investigate drivers' alleged violations and to recommend or impose penalties. Allegations of misconduct can come from a variety of sources, including customer complaints,

security slips issued by Communications Committee members and complaints from other drivers. The Security Committee meets three or four Mondays per month in the "Security office" at NYC 2 Way's base, a room with tables, chairs and a locked filing cabinet. The Security chair and co-chair (currently Zabib) have access to that room, to the filing cabinet, and to NYC 2 Way's computer system, so that they can print out computer dispatch records as part of their investigation.

The Security Committee used to be able to have NYC 2 Way automatically deduct fines from a driver's paycheck, without necessarily giving drivers an opportunity to respond to the allegations. However, in October 1997, Slinin issued a memo to drivers announcing new security procedures (Pet. Ex. 3), including the right to a hearing before the Security Committee. If the Security Committee's preliminary investigation shows that the allegation might be founded, the Committee asks the dispatcher to notify the driver to appear at next Monday's meeting. After the hearing, if the driver is found guilty, the Security Committee may notify NYC 2 Way to deduct a fine. Fines deducted from a driver's paycheck go into the Sunshine fund, which is described below in more detail. Pages 37 to 40 of Er. Ex. 3 lists maximum fines for various violations. The Committee uses various forms which NYC 2 Way pays to print, including the security slip, enforcement ticket, hearing list, hearing notification form and results form.

Zabib gave two examples of discipline issued by the Security Committee. For one, Zabib said that a driver was fined in 1998 for submitting a fraudulent voucher. However, Zabib could remember neither the driver's car number, nor the amount of the fine. As a second example, Zabib testified that, in the six months before his testimony, the Security Committee had fined two drivers $1,000 each for violating a rule against

verbally abusing Security or Communications members. However, Zabib could not remember their car numbers or names. To Zabib's knowledge, the Security Committee has never terminated a franchise on its own.

Sunshine Committee

The Sunshine "Club" or "Fund" is a multi-purpose collection of money, funded by the fines that are deducted from drivers' paychecks. During the course of 1999, the fund had deposits totaling approximately $140,000. Although it is a not a separately-incorporated entity, the Sunshine Club has a bank account separate from the NYC 2 Way's general ledger. Edward Slinin is the only signatory to the Sunshine Club account. NYC 2 Way's comptroller, Ron Karp, actually prepares the checks and stamps them with Slinin's signature.

Sunshine money is used for various purposes, including: paying the Security chair for Security meetings and other Security-related work (as described above); making loans to drivers to pay for their car insurance; helping drivers pay for parking tickets they received on the job; sometimes compensating drivers for customer no-shows for which the drivers have not been paid; paying for food at the annual election meeting; and paying expenses related to the NYC 2 Way drivers' soccer team. According to Hussein, committee chairs are authorized to tell Karp which checks to write from the Sunshine fund. For example, if a driver successfully appeals a fine, the Appeals chair could tell Karp to refund the fine payment back to the driver.

It is not clear from the record how the Sunshine Committee came into existence. On one hand, Zabib testified somewhat vaguely that the idea was proposed at the 1999

election meeting: "They put whoever wanted to speak, he said we should have Sunshine Committee.... And the driver[s] went for it and they vote[d]" (Tr. 954). However, both Zabib and Albasir also testified that when NYC 2 Way notified drivers of the election meeting that year, it instructed candidates for four committees, including a Sunshine committee, to give the company their names by the deadline. Later during cross examination, Zabib conceded that someone must have decided *before* the notification to institute a Sunshine Committee, but he did not know who made the decision. In any event, since only one person (Car 21, Mamdouh Hasanin) submitted his name for Sunshine chair in 1999, there was no contested election for that position. For his part, Hussein testified that the Sunshine Committee has existed since 1995 or 1996.

The Sunshine Committee apparently consists of 2 or 3 members. The record does not indicate whether they meet on a regular basis. The Committee's function in administering the fund is not entirely clear from the record, since Karp is the person who actually handles the account's deposits and payments. Although voluminous Sunshine fund records were entered into evidence, there was no testimony regarding specific decisions that the Sunshine Committee had made.

Appeals Committee

According to Hussein and Zabib, drivers have the right to appeal fines to the Appeals Committee. The Appeals Committee consists of 2 or 3 members. If the committee agrees to reverse a fine, the driver can receive a "refund" of the fine money from the Sunshine fund. No specific examples were given of Appeals Committee's actions.

Discipline and termination of drivers

In addition to some evidence regarding the Security Committee's imposition of fines, as described above, the record contained evidence of discipline, terminations and other actions taken by NYC 2 Way management without going through the Security Committee.

As previously noted, the franchise agreement lists various infractions for which franchises can be terminated (Er. Ex. 2, Section 44 of agreement, discussed above at p. 11). Although Hussein asserted that most of these rules are not in effect or are not enforced, he conceded that NYC 2 Way management (specifically Hussein himself or Slinin) may effectively terminate a driver's access to the dispatching system by blocking the driver's computer password. Hussein also testified that NYC 2 Way can program the computer dispatch system to remove a driver from certain accounts, for example if a customer complained of rudeness, without going through the Security Committee. Zabib testified that some rules violations may result in NYC 2 Way's automatically deducting a fine from the driver's paycheck, without going through the Security Committee. This is known as an "automatic 10:5". For example, the Rules and Regulations Manual provides that failure to comply with the NYC 2 Way dress code "will result in an Automatic 10:5" (Er. Ex. 3, Section 4.2).

Specific examples of NYC 2 Way's actions include the following. Hussein testified that in 1999 NYC 2 Way terminated a lease between a franchise owner and the lessee-driver, Car 189, because the driver had submitted fraudulent vouchers. Hussein himself prevented Car 189 from getting any more jobs dispatched in the computer system, and he notified the franchise-owner of this action. Hussein explained that NYC 2 Way may terminate a lessee-driver's rights, even over the franchise-owner's objection, in

order to protect the company. (The franchise-owner later sold the franchise back to NYC 2 Way, and the company now uses the designation of Car 189 for another driver.) Hussein also testified that Slinin decided to terminate Car 200 in 1998 for "padding" his vouchers. Furthermore, Hussein testified that a franchisee (not identified) was terminated in 1999 for repeatedly "harassing" a NYC 2 Way supervisor or manager, in violation of Section 44.17 of the franchise agreement. Although the franchise prospectus states that 11 franchises were terminated from January 1996 to December 1998 (Er. Ex. 2, p. 14 of prospectus), neither Hussein nor Zabib knew the circumstances of the other terminations.

Albasir also gave some examples of actions which NYC 2 Way took against drivers without going through the Security Committee. On a Sunday in November 1997, Albasir was late in picking up a new customer from Newark Airport, and the customer took a yellow taxicab instead. On the next day (Monday), Albasir booked into the Newark Airport zone but did not get any jobs in that zone for hours, even when he was at the top of the list. When Albasir called the base to complain, he was told that the dispatch supervisor (Richie, last name unknown) decided not to assign Albasir any jobs involving out-of-town pickups for two weeks. Albasir later complained directly to Slinin that Richie had taken him off out-of-town pickups without going through Security and without giving Albasir a chance to explain why he had been late on Sunday. However, according to Albasir, Slinin responded that Albasir had "screwed" him by being late for a new customer, and that whatever Richie did to Albasir was fine. Zabib (who was Security chair at the time) later told Albasir that Richie had told him about the incident,

but there is no evidence that the Security Committee actually made the decision to restrict Albasir from out-of-town pickups.

Albasir also testified about his own termination in September 1999.[41] As described above (p. 19), many drivers became angry when NYC 2 Way decided to pass the cost of customer discounts on to drivers, and Albasir participated in a meeting to discuss this issue in early September 1999. Details regarding this meeting, which differed in Hussein's testimony and Albasir's testimony, will not be described here. However, Albasir testified that when he tried to work shortly thereafter, he could not sign onto the computer system. When he later telephoned the base, a dispatcher told him that Slinin took Albasir off the air. According to Albasir, Slinin himself then got on the phone, told Albasir that the union (Petitioner) was "no good," that Albasir was an intelligent person, and that Albasir should sell his franchise back to NYC 2 Way and start his own business. However, Albasir refused, and Slinin then "cursed" him. On or about September 7, 1999, Albasir received a letter from an attorney stating that NYC was terminating Albasir's franchise agreement for his "libelous" conduct and for his violations of the agreement (Pet. Ex. 10). Albasir said that he has not been able to sign onto NYC 2 Way's computer system since then, although (as described below) other drivers have been allowed to use Albasir's personal identification number to drive for the company. In short, regardless of whether Albasir's termination was unlawfully motivated, which is not relevant for purposes of this proceeding, it appears from Albasir's testimony that NYC 2 Way management, not the Security Committee, decided to terminate him.

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41 Albasir's termination was the subject of an unfair labor practice charge in Case No. 29-CA-23352. However, the charge was dismissed in April 2000 due to Albasir's lack of cooperation.

Finally, Albasir gave two examples regarding other drivers. Specifically, Albasir testified that Car 364 was fined $1,000 for voucher padding, after the driver had priced the voucher as going to "Middletown," New Jersey, rather than "mid-town" Manhattan. According to Albasir, Hussein said that Slinin was the only person who had the "capacity" to impose the fine.[42] Albasir also testified that, back in June 1999 when Albasir worked at the NYC 2 Way base and a driver named Aala Rawdan drove Albasir's car, Slinin gave Rawdan an "automatic 10:5" fine of $250 for being late for a pick-up in Connecticut. According to Albasir, Slinin later told him that Rawdan was "no good," and that Albasir should "throw him out."

Drivers' entrepreneurial activity

The record indicates two ways in which franchisees or drivers could potentially make money, other than accepting fares through NYC 2 Way's dispatching system. One category involves a franchise-owners' leasing of radio rights to lessee-drivers. The other category involves whether drivers may earn money by accepting fares outside the NYC 2 Way dispatch system (including the "private booking" of NYC 2 Way customers, working for other dispatch bases, etc.).

As mentioned above in connection with lessee-drivers, there are about a dozen franchise owners who lease their "radio rights" to lessee-drivers. Some of these franchise owners also drive, and some do not. For example, Hussein testified that Assad Faraj owns two franchises: Car 94, which Faraj himself drives, and Car 299, which another driver leases from him. By contrast, Hussein himself owns 12 franchises, but does not

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42 The Employer's brief misrepresents Albasir's testimony on this incident, which appeared on pp. 1969-73 of the transcript. On page 20 of its brief, the Employer cites p. 1970 of the transcript to assert that Albasir himself as Communications chair issued a security slip to a driver which resulted in a $1,000 fine,

drive. According to Er. Ex. 20, there are six owners of multiple franchises who lease *all* of their franchises to drivers. The record does not contain much information regarding the

arrangements between franchise owners and lessee-drivers, other than that their lease payment is not more than $110 per week. As mentioned above in connection with Car 189's termination for voucher fraud, NYC 2 Way may terminate a lessee-driver's radio rights, even over the objection of the franchise owner.

It should be noted that not all drivers who drive under another person's franchise actually pay lease payments. For example, the record indicates that "double-shifting" occurs, wherein a franchise owner splits his shifts with another driver, and they each submit their own vouchers. As noted above, a pair of such drivers pays $60 per week in weekly radio dues, rather than an individual driver who pays $44 per week. As an example, Albasir testified that he used to double-shift with another driver named Maan Harmouch for about five months in 1998. They paid $30 each in radio dues, shared expenses, and decided between the two of them how to split up their hours. This appears to more akin to "job-sharing" than leasing; there is no evidence that Harmouch made lease payments to Albasir as the franchise owner. Albasir also testified about a somewhat curious arrangement he has had with a driver named Aala Rawdan since November 1999. For some reason, even though NYC 2 Way purported to "terminate" Albasir's franchise in September 1999 (*see* Pet. Ex. 10), the company has allowed Rawdan to use Albasir's identification code to access the computer dispatch system. Albasir testified that Rawdan uses Albasir's car, radio and identification code to drive for

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and further asserted that "there is no suggestion that the company had any hand" in the disciplinary action.

NYC 2 Way. Rawdan pays the car insurance and expenses, and submits his own vouchers under Albasir's franchise number (Car 20). The paychecks are made to Albasir, but he then cashes or signs over the checks to Rawdan. Albasir testified that Rawdan, whom he described as a "good friend," does not make any rental payment to him for use of the franchise. Thus, it appears that this arrangement is not a lessor-lessee arrangement.

As for drivers' ability to earn money outside the NYC 2 Way dispatch system, the record indicates the following. As discussed above in connection with the Communications Committee (pp. 43-44), there is no dispute that some drivers engage in "private booking" of NYC 2 Way's customers, despite the franchise agreement and the rule book's prohibition of that practice. Both Zabib and Shah claimed to make substantial earnings from private bookings of NYC 2 Way customers. Zabib also presented hearsay evidence that other drivers perform private bookings, but I find such evidence to be of little probative value. Albasir also admitted to engaging in this practice although, as noted above, he tried unsuccessfully to change the practice while he was Communications chair. It should be noted that NYC 2 Way collects the same commissions and fees for those private jobs as regular jobs, by deducting from the voucher payments. Thus, these bookings are not "private" in the sense that they are independent from NYC 2 Way, or that they take customers or payments away from NYC 2 Way. (In fact, it appears that private bookings may help NYC 2 Way to retain "VIP" customers who want to able to contact their favored drivers directly.) Rather, the

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In fact, Albasir's testimony was quite the opposite -- i.e., that Slinin, not the Committee, imposed the fine.

bookings are "private" in the sense that customers contact the drivers directly, excluding or bypassing other drivers in the usual dispatching system.

The record also indicates that drivers may keep the entirety of cash payments from customers, without having to pay commissions and fees to NYC 2 Way. However, this opportunity is very rare, since passengers almost always pay with their corporate vouchers.

Although the franchise prospectus also prohibits franchisees from providing transportation services to anyone other than NYC 2 Way's customers without NYC 2 Way's "prior authorization" (Er. Ex. 2, Section 16(a)), Hussein testified that franchisees do not need such authorization. Hussein provided hearsay evidence that one driver said he books himself into NYC's computer system while waiting in front of the base of another black-car company, but Hussein could not even remember the name of that driver. In an offer of proof, NYC 2 Way claimed that Mohammed Shah, who has driven for NYC 2 Way for 10 years, would testify that he also performed work through other companies during that period. Specifically, the proffered evidence included testimony that Shah bills approximately $4,000 per year to a customer called Coats Viyella Clothing Corp., for airport pickups and other trips in the New York City area; that he earned approximately $2,000 in 1998 through a company called Night Rider; and that he also earned approximately $9,000 in 1999 through Northeast Limousine. I have reversed the Hearing Officer's ruling to exclude the proffered evidence (supra at p.2). Thus, for purposes of the present discussion, I assume that Shah would have testified as proffered. There were no other examples of drivers performing work for other companies while working for NYC 2 Way.

There is no dispute that Taxi and Limousine Commission regulations forbid black-car drivers from picking up passengers without having been dispatched through the base. Section 6-16(f) of TLC regulations provides: "A driver shall not solicit or pick up passengers by means other than prearrangement through a licensed base," Ex. Er. 10.) Zabib claimed that he indeed picks up "street hails" in violation of the TLC regulations, but the Hearing Officer struck this testimony from the record as irrelevant, and I have previously affirmed this ruling (Bd. Ex. 2).

DISCUSSION

In Roadway Package System, Inc., 326 NLRB No. 72 (1998)("Roadway"), after years of debate concerning the proper criteria by which to evaluate a person's status as "independent contractor" or "employee," the Board stated that it would apply the common-law test of agency. This test, as described in Restatement (Second) of Agency, Section 220, requires consideration of several factors, including: whether the work performed is an essential part of the company's regular business; whether the person is engaged in an occupation or business that is distinct from the company's regular business; the length of time for which the person is employed or contracted; the skill required in the particular occupation; whether the company provides the tools and instrumentalities necessary to perform the work; the method of payment (whether by time or by the job); and the extent to which the company may control the details of the work. No one factor is determinative. Although many prior cases had emphasized the employer's "right to control" the details of performing the work, the Board in Roadway clarified that all factors regarding the parties' relationship must be considered, not just those involving the right to control. It is interesting to note that many pre-Roadway cases in the taxicab, car-

service and limousine industries examined both the company's control over how the drivers conducted business on the road *and* the relationship between the company's compensation and the amount of fares collected. Air Transit, Inc., 271 NLRB 1108 (1984); Yellow Cab of Quincy, Inc. et al., d/b/a Yellow Cab Co., 312 NLRB 142 (1993). Thus, those cases are not necessarily inconsistent with the Board's declaration in Roadway that *all* aspects of the parties' arrangements, including the parties' financial interdependence and the drivers' opportunities for independent entrepreneurial activity, must be considered.

As both the Board and the Supreme Court have acknowledged, it is often difficult to determine whether a person is an employee or individual contractor, and there is "no shorthand formula or magic phrase that can be applied to find the answer." Roadway, slip op. at 8, citing NLRB v. United Insurance Co. of America, 390 U.S. 254 (1968). Typically, factors exist on both sides of the issue within the same case, and all fact must be carefully analyzed.[43]

In the instant case I find that, although some factors (such as the drivers' ownership of the vehicles) may support a finding of independent contractor status, the preponderance of factors weighs more heavily in favor of finding NYC 2 Way's drivers to be employees. First of all, the work performed by the drivers is an essential part of the

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43 The Employer urges this Agency to consider a set of guidelines published by the Internal Revenue Service (IRS) for determining independent contractor status in the limousine industry. The Employer asserts that, if those guidelines were followed, its drivers would be found to be independent contractors. The Board has held that, while IRS determinations regarding independent contractor status may be considered, they are not controlling. Roadway, supra, at fn. 46. In any event, there is no evidence that the IRS has specifically found NYC 2 Way's drivers to be independent contractors. Thus, it is not clear that *on these particular facts* the IRS' standards would support NYC 2 Way's position. For the same reason, I also reject the Employer's reliance on the state law creating the New York Black Car Operators' Injury Compensation Fund, discussed briefly above at fn. 7. That law treats drivers as "employees" of the Fund for purposes of providing workers compensation coverage only, and in no way constitutes a finding that the drivers herein are not employees of NYC 2 Way.

NYC 2 Way's regular business, which is to provide transportation services to customers. That is all the company does. Thus, the *entire* business of NYC 2 Way is devoted to providing transportation services for which the drivers actually provide the labor. Unlike a stereotypical independent contractor relationship (such as an electrical contractor who is contracted to install computer transmission lines in a business office, but whose work is not part of the office's regular business operation), the drivers here are not engaged in an occupation or business that is distinct from the company's regular business. Rather, the drivers are engaged in an occupation that is an integral part, if not the entirety, of NYC 2 Way's regular business of providing transportation services. Moreover, with one exception noted below, the drivers drive only NYC 2 Way's customers, which is an indication of employee status. United Insurance Co., supra, 390 U.S. at 259 (insurance agents who ordinarily sell only the company's policies, found to be employees). In addition, most aspects of the business except for the actual transportation of customers -- including receiving customer orders, dispatching, billing customers and paying the drivers -- are conducted from NYC 2 Way's premises. Fugazy Continental Corp., 231 NLRB 1344 (1977), enfd. 603 F.2d 214 (2nd Cir. 1979)(franchisee/limousine drivers as employees).

The drivers' connection to NYC 2 Way's operations is further demonstrated by the fact that they work under the NYC 2 Way name, with the company's logo required to be visible on their cars. As the drivers in Roadway, whose trucks displayed the company's name and logo, the drivers' integration into NYC 2 Way's operations is highly visible.

Examination of NYC 2 Way's revenues further underscores the integral role that drivers play in the company's regular business. As Hussein conceded, all of NYC 2 Way's income is generated as a result of the drivers' work, i.e., from customers' payments for the transportation and related services which the drivers provide. The company has no significant income from any other sources. Furthermore, the record indicates the company's income is directly correlated to the amount of fares collected by the drivers. Specifically, the 17.5% or 22% commission payments, the $1-per-voucher service fee and the 50¢-per-voucher Radio Club deductions -- which are all withheld from the customers' gross voucher payments before the net payment to drivers is made -- depend entirely on the number and amount of fares collected by drivers. In addition, drivers' payments of radio dues ($44 per week), franchise installment payments ($110 to $130) and/or lease payments ($110 per week) are made only for those weeks when drivers drive, not for weeks when they put their radio "on the shelf." The Board has found that this sort of financial correlation between the company's income and the amount of fares indicates an employer-employee relationship rather than a truly independent relationship between two businesses. Metro Cars, Inc., 309 NLRB 513 (1992); Yellow Cab of Quincy, supra; Elite Limousine Plus, Inc., 324 NLRB 992 (1997).[44] This correlation shows not only the direct and substantial stake which NYC 2 Way has in the amount of driver-generated fares as part of its regular business (Metro Cars, supra, 309 NLRB at 516; Elite, supra, 324 NLRB at 1002), but it also reveals an incentive for the company to maximize fares and to control the drivers' means and manner of performing the work

[44] *Compare* Air Transit, Inc., 271 NLRB 1108 (1984), and City Cab Co. of Orlando, Inc., et al., 285 NLRB 1191 (1987), where independent drivers paid only a flat weekly fee to the company and otherwise kept the fares they collected.

(Yellow Cab of Quincy, supra, 312 NLRB at 145). Also, the requirement for drivers to account for the vouchers they collect through an elaborate and regular reporting procedure tends to indicate employee status. United Insurance, supra, 390 U.S. at 259; Metro Cars, supra, 309 NLRB at 516.

Another factor under the common-law agency test is the length of time for which the person is employed or contracted. A long-term or indefinite relationship tends to indicate employee status, as opposed to be being contracted to perform a specific, discreet job. In this case, the record clearly shows that NYC 2 Way hires drivers to work on an indefinite basis. Their relationship with the company is essentially permanent, as long as their performance is satisfactory. United Insurance, supra. In fact, the financial arrangement for paying off the cost of franchises, which NYC 2 Way finances over a period of up to five years, obviously contemplates an ongoing, long-term relationship.

NYC 2 Way provides important "tools and instrumentalities" necessary to perform the work, namely the entire computer dispatching system at the NYC 2 Way base, and the related radio/computer units which are installed in the cars and which remain property of the company. This major capital investment of the company allows it efficiently to dispatch and monitor hundreds of cars providing more than 12,000 rides per week. Furthermore, although drivers own their own vehicles, that fact alone is insufficient to confer independent contractor status. Elite and Fugazy, supra. For example, although the drivers in Fugazy owned their own limousines, the Board noted that the company nevertheless specified the type of vehicle to be used, including the make, model and color, and certain related equipment. The company's efforts to compel drivers to conform to the promises made to customers regarding the vehicles' quality,

while not unreasonable, tended to "attenuate the importance of their vehicle ownership as an indicium of independent contractor status." 231 NLRB at 1353. (*See also* Roadway, slip op. at 10, drivers are employees, even though the employer "shifted certain capital costs" by requiring them to own or lease trucks.) In the instant case, although Employer witnesses Hussein and Zabib attempted to downplay NYC 2 Way's vehicle requirements, the record clearly shows that the company requires certain vehicle makes, colors and equipment, as well as displaying the NYC 2 Way logo. Thus, I find that, although NYC 2 Way's drivers own their own vehicles, their independence is limited in that regard.

The common-law agency test, as stated in the Restatement (Second), also examines whether skill is required "in the particular occupation." In this case, the occupation of transporting passengers does not require special skills, other than the ability and the proper licensing to drive. The record indicates that NYC 2 Way drivers are not required to have prior experience in driving. Furthermore, any training required for the drivers (such as learning the computer dispatch codes, how to use the computer/radio equipment installed in their cars, how to price the vouchers, etc.) is provided by NYC 2 Way. The facts that prior experience or special skills are not required, and that the company provides training, indicate employee status. United Insurance, supra, 390 U.S. at 259; Roadway, supra, slip op. at 10.

The method of payment issue listed in the Restatement, i.e., whether the individuals in question are paid "by time" or "by the job," is not susceptible to easy analysis in this context. Drivers are clearly not paid by time, such as an hourly wage. Nor are they paid for a discreet, finite job in the same way that a stereotypical independent contractor is paid, such as the hypothetical electrical contractor mentioned

above. Rather, the drivers are paid "by the job" for a *series* of jobs, typically multiple jobs per day, on an on-going and indefinite basis. The individuals in the Fugazy and Elite cases, supra, were essentially paid a percentage for each "job" or fare, and were nevertheless found to be employees. In those cases, the Board did not expressly address the "by the job" nature of these payments, but instead emphasized the employers' stake in maximizing the number of jobs, and the employers' power to establish and change the percentages unilaterally. I find that, under these cases, the commission-type method of payment herein for an indefinite series of jobs, the terms of which are unilaterally controlled by NYC 2 Way, more closely resembles employment wages than true "contract" payments. I also note that NYC 2 Way's drivers have some opportunity for hourly-paid work during customers' holiday parties and other special events.

As noted above, the traditional right-to-control factors upon which many pre-Roadway cases relied are still relevant, although they are not the only factors to be considered. In this case, the record shows that the company in fact retains significant control over the details of the work which its drivers perform on the road.

As noted above, NYC 2 Way's computerized dispatching system allows the company efficiently to dispatch and monitor hundreds of cars providing more than 12,000 rides per week. These actions must be carefully coordinated, in order to have drivers available to customers in various locations without excessive waiting time, and to maximize the total number of fares. Through this system, NYC 2 Way can oversee the work performed by drivers and monitor their location at any given time. By requiring drivers to indicate their status via various codes ("circling" the location, picking up and dropping off customers, etc.), it also allows NYC 2 Way to record detailed information

about each job (e.g., time of arrival), for billing purposes and in case of potential billing disputes with customers. This close oversight is generally more typical of an employer-employee relationship than the relationship between two independent businesses. Furthermore, as a result of the dispatching system, drivers are locked into a detailed protocol they must follow throughout their working hours. They must book into zones that were established by NYC 2 Way. They must also follow certain other procedures such as generally booking into only one zone at a time, and limiting their break time to one of no more than15 minutes every two hours. At certain times, the system has allowed only a certain number of drivers to book into airport zones, in order to encourage more drivers to go to Manhattan zones. When NYC 2 Way's system offers a job, the driver must decide whether to accept or reject it, even without knowing the destination. Depriving drivers of the opportunity to evaluate jobs fully before determining whether to accept them severely limits their entrepreneurial prerogative. As the Board stated in Yellow Cab of Quincy, supra, "It is difficult to imagine what other information would be more crucial to the driver when he decides whether or not to accept a fare from the dispatcher. Thus, the Employer can effectively regulate how much and what type of business each driver receives." 312 NLRB at 145. NYC 2 Way's dispatching system also penalizes drivers for rejecting, forfeiting or bailing out of fares by booking drivers off the list, and forcing them to book back in at the bottom of the list. The record also indicates that NYC 2 Way retains control over such details of the work performed as how long drivers must wait for customer "no shows," whether to use "Code 35" to allow a driver back to the top of a list, whether new drivers will be assigned to out-of-town pickups during their first 30 days, and specifics of the dress code. Clearly, these

elements of control go beyond what is required by TLC regulations and beyond common-sense rules to ensure customer satisfaction. Rather, they constitute significant control over the assignment of work, and the means and manner of drivers' work while they are on the road, which is characteristic of an employment relationship.

Admittedly, NYC 2 Way does not control the drivers' hours or schedules, as drivers are free to book into the system whenever they choose to work. However, this factor has not been found to establish employee status. Elite and United Insurance, supra. Similarly, although the freedom to determine the location at which ones works may indicate independent contractor status, the drivers' freedom in this regard is not absolute. Rather, it is limited by such practices as "chasing" drivers into secondary zones, and zone limits at airports.

The Employer also enforces its control over the drivers' conduct by using a combination of rewards and punishments. For example, although NYC 2 Way does not officially "grade" or classify drivers, it nevertheless rewards certain drivers whom it deems more suitable by assigning jobs to them outside the dispatching system. The franchise agreement explicitly reserves NYC 2 Way's right to assign jobs based on the drivers' experience and the vehicles' appearance. In addition to rewarding drivers who meet certain standards, the Employer also enforces its control by punishing the drivers who do not meet those standards. A company's power to enforce standards of conduct, particularly those regarding the means of performing the work, indicates an employer-employee relationship. Fugazy, supra, 231 NLRB at 1344. As described above in detail, the Employer has authority to remove drivers from certain accounts where customers have complained; to make punitive deductions from drivers' paychecks, including

"automatic" fines for dress code violations; to restrict drivers from out-of-town pickups; and to terminate franchises altogether.

The Employer has tried to distance itself from the control its maintains over drivers by claiming that the drivers' committees actually make and enforce all rules. However, this claim must be rejected on several grounds. First of all, it is clear that the authority and responsibility to issue rules emanates from the Employer, even if the Employer chooses to delegate the task to committee members. The franchise agreement, which the Employer alone drafted, requires franchisees to conduct themselves in accordance with the rule book which, despite Hussein's initial denials, obviously refers to the Rules and Regulations Manual (Er. Ex. 3). Specifically, Section 23 provides: "In order to protect the reputation and goodwill of Franchisor and to maintain uniform standards of operation under the System, Franchisee hereby agrees to conduct its business in strict accordance with the Rulebook." The franchise agreement also provides that violations of those rules are grounds for terminating a franchise, and reserves NYC 2 Way's right to supplement or change the Rules book. In addition to NYC 2 Way's obvious interest in protecting its own business by having the drivers follow rules, the Taxi and Limousine Commission also gives base operators the responsibility of maintaining and enforcing written rules. Thus, even if one believes that committee members actually wrote Er. Ex. 3 without any input from NYC 2 Way, which is extremely doubtful on this record (see pp. 12-4 above), those members clearly would have been acting on behalf of the company's interest as agents. Indeed, it is difficult to believe that the Employer, on its own, would draft a franchise agreement leaving the development and enforcement of rules to a committee if it did not expect the committee

to act in its interests. Furthermore, it is clear from Albasir's undisputed testimony that the Communications Committee was not free to change rules during his tenure as chair. Although the committee made various proposals, it was ultimately the company's decision whether to accept or reject those proposals. This evidence seriously undermines the Employer's contention that the committees alone controlled all rules. Finally, although the record shows that many of the rules embodied in Er. Ex. 3 were not actually enforced, the Employer clearly retained the contractual right to enforce them. In determining employee or independent contractor status, it is not only the exercise of control but ultimately the *right* of control that matters. AmeriHealth Inc., 329 NLRB No. 76 (1999); Restatement, Section 220(1).

The Employer's attempt to distance itself from its control over drivers via the committees also fails in light of the Employer's direct or indirect influence over the committees. There is no dispute that the Employer involves itself in the elections for committee chairs, for example, by requiring candidates to submit their names to company in advance and by attending the election meeting, even though management personnel do not actually vote. Albasir testified thatdi management personnel further interfered with the elections by instructing drivers to vote for certain candidates, watching the drivers vote, and threatening to throw out disfavored candidates. (Albasir also testified that management tried to interfere with the selection of Communications Committee members, although it appears that NYC 2 Way ultimately agreed to waive the radio dues for Albasir's nominees.) The record further shows that the Employer gives financial assistance to the committees and its members by providing them with a room and furniture at the Brooklyn base, waiving their radio dues ($44 per week), paying them to

attend committee meetings ($50 per meeting) and for other security work. Although the Employer contends in its post-hearing brief that such amounts are insignificant, the record indicates that Zabib earned thousands of dollars in 1997 for his work as Security chair.[45] These indications of the Employer's control of, and assistance to, the committees further demonstrates that they act as the Employer's agents and, to some extent, at the Employer's pleasure. Here again, it is difficult to believe that the Employer would allow committee members to control the conduct of its drivers, let alone reward them for doing so, if it did not expect the committees to enforce the rules in the Employer's interest. In fact, Albasir's testimony may suggest that Slinin decided to terminate Albasir for *not* acting in the company's interests when he protested the customer-discount issue as Communications Chair.

Finally, despite the Employer's claim that the committees alone establish and enforce all rules, the record contains scarce evidence of independent actions by the committees. While Zabib claimed to recall that the Security Committee fined three drivers from 1998 to the time of his testimony in early 2000, Zabib could not recall the drivers' names or car numbers. By contrast, the record indicates many specific examples of actions, including fines and terminations, which NYC 2 Way took without going through the Security Committee. In any event, even if the Security Committee recommended punishing a driver, the mechanisms for actually doing so (deducting fines from drivers' paychecks, taking drivers "off the air," etc.) are in the Employer's control. Similarly, as noted above, the record indicates that any proposed rule changes by the

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45 Furthermore, any contention that the Sunshine Club, not the Employer, pays the committee members, must be rejected as a proverbial fig leave. The record clearly indicates that the Sunshine bank account its controlled solely by Edward Slinin.

Communications Committee are ultimately within the Employer's discretion to accept or reject. For example, only the Employer can control whether drivers will be paid for customer no-shows.

With regard to the business relationship between NYC 2 Way and the drivers, the record does not indicate a level of independence that truly separate businesses would normally have. First of all, drivers do not negotiate the terms of franchise agreement with NYC 2 Way. Rather, the company unilaterally promulgates the terms under which drivers work, an indication of an employer-employee relationship. Fugazy, supra, 231 NLRB at 1345; Yellow Cab of Quincy, supra, 312 NLRB at fn.7. Second, the drivers do not negotiate prices with NYC 2 Way customers, leaving them no room to influence their income in this way. Roadway, slip op. at 11. They are essentially just a link in the chain between NYC 2 Way and its corporate customers, providing the actual labor of transporting the passengers, but having no power to negotiate the terms of compensation on either side. Furthermore, NYC 2 Way retains authority to change those terms unilaterally in ways that decrease the drivers' earnings. Specifically, as noted above, the franchise agreement reserves NYC 2 Way's right to increase its commissions (currently 17.5 % and 22%) to 30% and 50%; to increase the weekly radio dues from $44 to $125 for a single shift, and from $60 to $175 for a double shift; to change the per-voucher fee from $1 to $30 (a 3,000% increase) "at any time without notice"; and to pass along the cost of customer discounts of up to 25%. The record further indicates that the company *has* indeed changed the parties' financial arrangements, including not only increasing the commissions and passing along the cost of a 5% customer discount, but also changing the transfer fees, and the non-refundable portion of the equipment deposit. The unilateral

control which NYC 2 Way maintains over the terms of drivers' compensation is more akin to a "master-servant" relationship than two independent businesses. United Insurance, supra, 390 U.S. at 259; Fugazy, supra, 231 NLRB at 1344-5.

The Employer argues that the drivers herein are independent businesses, with opportunities to make profits through entrepreneurial activity. In this regard, three areas of potential must be considered: the drivers' activity as drivers for NYC 2 Way, the drivers' opportunities to drive for other entities or customers, and franchisees' opportunity to profit from the franchise itself as an "investment" or by leasing to other drivers.

As for the drivers' work within NYC 2 Way itself, the Employer points out that drivers may choose when to work, when to take a break, where to work (including which zone to book into and whether to stand in one of the five "lines" at customers' Manhattan locations), whether to accept or reject/forfeit a specific job offered, and whether to ask to be taken off certain small-fare accounts altogether. The Employer argues that these choices demonstrate the drivers' independence in making business decisions to maximize their profit. However, I find that these choices give drivers very minimal independence to influence their income, compared to the important elements controlled exclusively by the Employer. In reality, drivers have little choice but to accept the jobs that the Employer offers to them via its dispatching system, following all the protocols established by the Employer. First, as discussed above, the drivers' independence regarding the zones and break times is not absolute. Second, when a job is offered, the driver is not told the customers' destination, a crucial piece of information which would allow the driver to evaluate its "profitability." Yellow Cab of Quincy, supra. Third, drivers are not free to reject or forfeit jobs without going to the bottom of a zone list, a

significant disincentive. Fourth, the record also indicates that drivers do not negotiate with customers regarding the fares or discounts, nor with NYC 2 Way regarding its commissions, dues and fees. The bottom line is that drivers do not have much "entrepreneurial" control over the "profitability" of their work as drivers for NYC 2 Way, but instead are almost entirely dependent on the job-assignment system and payment arrangements as determined by the Employer.

Regarding so-called "private booking" of NYC's customers, the record indicates that both the franchise agreement and the Rules book expressly prohibit the practice. There is no evidence that NYC 2 Way has expressly revoked those prohibitions by informing drivers that they are free to make private arrangements with NYC 2 Way's customers, effectively bypassing the zone waiting lists. In fact, to the contrary, Albasir testified that Slinin refused to revoke those provisions, fearing difficulty in attracting new drivers if they knew that all the good jobs had already been booked outside the dispatch system. Thus, a system exists wherein NYC 2 Way has allowed certain drivers to get away with private bookings, without opening the practice to all drivers. This kind of selective enforcement hardly constitutes evidence of independent business opportunities. On the contrary, it reinforces the notion that NYC 2 Way ultimately decides how to distribute work, regardless of what its "contract" with franchisees provides.

The record also indicates very little evidence of entrepreneurial opportunity to drive for other entities or other customers. First of all, TLC regulations prohibit black-car drivers from picking up "street hails," i.e., passengers who were not dispatched through the driver's base. The franchise agreement also forbids franchisees from providing transportation services to anyone other than NYC 2 Way's customers without

the company's prior authorization. Admittedly, the Employer proffered testimony that Mohammed Shah earns thousands of dollars per year driving for other entities. However, I find this evidence regarding one driver -- out of a unit of 500 drivers -- insufficient to prove the existence of real entrepreneurial opportunity. Furthermore, given the types of fixed weekly payments that are typical in the black-car industry (including radio dues and franchise/lease payments), it is probably not affordable or cost effective for drivers to pay those costs to more than one base operator at a time. As the Board has said, the existence of entrepreneurial opportunities that drivers "cannot realistically take" does not add any weight to the claim that they are independent contractors. Roadway at fn. 36, citing C.C. Eastern v. NLRB, 60 F.3d 855, 860 (D.C. Cir. 1995). Thus, proffered evidence that one driver out of 500 managed to drive for multiple companies at a time does not prove that that is an entrepreneurial opportunity that drivers can realistically take.

With regard to the franchise purchase itself as an "investment," the record contains no evidence that franchisees have sold their franchises at a profit. All of the franchises which NYC 2 Way reacquired were sold for much less than the $32,000 buying price. Specifically, the record indicates that, in 1998 and 1999, NYC 2 Way directly repurchased three franchises for only $5,000 each, and it used Radio Club money to repurchase 14 franchises for $9,000 to $20,000 each. Furthermore, although there was evidence that four franchise-owners have sold their franchises to third parties since 1998, Hussein did not know the sale prices. In any event, the $2,000 transfer fee imposed by NYC 2 Way would appear to discourage such third-parties transfers. The Board has held that insubstantial amounts of drivers' "entrepreneurial activity" regarding the sale of franchises, where the company has actually maintained control of most franchises and

discouraged franchise sales to third parties, do not establish independent contractor status. Elite, 324 NLRB at 992. *See also* Roadway, slip op. at 12 (lack of detailed evidence showing whether drivers profited from their sales of "service areas"). Furthermore, it should be noted that the franchise agreement allows NYC 2 Way to terminate the agreement for alleged breaches thereof "without payment of any kind" to the franchisee (Er. Ex. 2, Section 44). Breaches for which NYC 2 Way can terminate a franchise under Sections 44 and 45 include some extremely vague provisions, such as "any action which is not in the best interests of the Franchisor," "violating the spirit of the agreement by taking or omitting any action which Franchisee knew or should have known would be improper," and any other breaches "not particularized in the above list." The Fugazy decision held that:

> Although a capital investment in the enterprise from which an individual expects to earn his livelihood suggests that he may have a managerial or entrepreneurial interest in the business, where, as in this case, the investment is subject to forfeiture at any time for arbitrary, vague, and uncertain reasons, the entrepreneurial or managerial aspect thereof is more illusory than real.

231 NLRB at 1353. Thus, NYC 2 Way's ability to terminate the franchise without payment or any effective resource for the franchisee, for reasons that may be vague or uncertain, further undercuts any contention that franchise ownership represents a real entrepreneurial investment.

Finally, it appears that some owners of multiple franchises lease their radio rights to other drivers. (See discussion above, pp. 24-7 and pp. 56-7). According to Hussein, this group includes two incorporated franchise owners (Peter Transportation, Inc., 7 franchises, and S & P Limo, Inc., 2 franchises). Unfortunately, despite the exhaustive detail in which drivers' relationship to NYC 2 Way was explored on the record, the

relationship between these franchise owners and lessees was not explored in great detail. For example, although the record indicates that their lease payments is no more than $110 per week, there is no explanation of why the franchise owners would not be free to negotiate a higher lease payment, since the lease would presumably be a matter between the franchisee and lessee. There is no evidence as to how the owners came to own multiple franchises; whether they own the vehicles which lessees drive; whether they themselves also drive; whether they make a profit from the lease arrangements; and whether they have any control over the lessees' hours, training or other working conditions. On this record, there appears to be insufficient evidence upon which to determine their status as independent contractors, employees or possibly even supervisors. Therefore, although I direct an election among NYC 2 Ways' drivers below, the status of any drivers who also lease franchises to other drivers may have to be resolved in a post-election challenged ballot proceeding.

Based on the foregoing, I find that the Employer has not met its burden of proving that the drivers are independent contractors. Accordingly, I hereby find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, including franchisee-drivers and lessee-drivers, employed by the Employer from its base at 335 Bond Street, Brooklyn, NY, but excluding all other employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of

election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the Local Lodge 340, District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO, or by Local 713, National Organization of Industrial Trade Unions, or neither labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be

received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before August 7, 2000. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by August 14, 2000.

Dated at Brooklyn, New York, July 31, 2000.

/s/ DAVID POLLACK

_____

David Pollack
Acting Regional Director, Region 29

National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

177-2414-0100 et seq.
177-2484-5000 et seq.
177-2484-5067-6000

APPENDIX

The transcript is hereby amended as follows:

Page 5, line 21 et seq.: All references to the "Intervener" should be spelled "Intervenor".

Page 8, line 24: "principal" rather than "principle".

Page 17, line 3: "offices" rather than "officers".

Page 57, line 19 et seq.: All references to "burroughs" of New York City should be spelled "boroughs".

Page 142, line 1: "package" rather than "baggage".

Page 142, line 8: "Aleph" rather than "Olive".

Page 156, line 14 et seq.: All references to "bigger" point should read as "pickup" point.

Page 209, line 12 et seq.: All references to Section "211" should be punctuated as "2(11)".

Page 217, line 6: The amount of dues is $44, rather than $4.

Page 238, line 24: "Standard and Poors" rather than "Standard in Pors".

Pages 278, line 17 et seq.: All references to "Ferris" should be spelled "Fares". All references to Mr. "L.Basir" or "Basir" or "ElBasir" should be spelled "Albasir". (The driver's name is Fares Albasir.)

Page 309, line 19: "I.D.s" rather than "ideas".

Page 310, line 22: "take off" rather than "think of".

Page 327, line 25 et seq.: All references to the "principle" place of business should be spelled "principal".

Page 339, line 16 et seq.: All references to "perspective" franchisees and drivers should be spelled "prospective".

Page 350, line 24: "taxi" rather than "tax".

Page 362, line 6 et seq.: All references to the "perspectus" should be spelled "prospectus".

Page 384, line 15: Car number "102" rather than "one or two".

Page 445, line 22 et seq.: All references to "Gorman" Sachs should be spelled "Goldman" Sachs.

Page 446, line 2 et seq.: Chelsea "Piers" rather than Chelsea "Cheers" or "Pierce".

Page 478, line 6 and 7: "Elsharkany" rather than "El Chakoni".

Page 490, line 20 et seq.: All references to 85 Broad "Court" should be spelled 85 Broad "Corp."

Page 617, line 18: "cell" rather than "sale".

Page 719, lines 16-24: "NBC" [National Broadcasting Company] rather than "NYC".

Page 773, line 24: "MS. JACCOMA" rather than "MR. COLEMAN".

Page 813, line 12: "Ntfd" [abbreviation for notified] rather than "NYPD".

Page 865, line 25: "Triboro" Bridge, rather than "Tribull".

Page 893, line 14 et seq.: All references to "entrap in a real" activity should be spelled as "entrepreneurial" activity.

Page 895, line 14: "violation" rather than "volition".

Page 899, line 20: "entrepreneurial" activity, rather than "a trip in a real" activity.

Page 920, line 5 et seq.: All references to "Sahmi" Zabib should be spelled "Samih".

Page 1058, line 20: "now" rather than "not".

Page 1113, line 23: "Aleph" rather than "Alif".

Page 1131, lines 7 and 13: "Ditmas" rather than "Dickmas".

Page 1264, line 18: "in Security" rather than "insecurity".

Page 1300, line 13: "book in zone" rather than "book his own".

Page 1301, line 3: "in zone" rather than "his own".

Page 1367, lines 11-12: "Sing-Sing" rather than "sing sing".

Page 1442, line 13: All references to a "breech" or "breeches" of the agreement should be spelled as "breach" or "breaches".

Page 1464, line 16: "sheer" rather than "shear".

Page 1483, line 24: "canceled" rather than "counseled".

Page 1483, line 24, last word: "were" rather than "or". ["The number of franchisees canceled or terminated **were** 11."]

Page 1538, line 18: "max" [as in maximum] rather than "maps".

Page 1551, line 5: Employer Exhibit 37 should be listed as 37 (a) and (b).

Page 1551, line 6: Employer Exhibit 38 should be listed as 38 (a), (b) and (c).

Page 1551, line 8: Employer Exhibit 40 should be listed as 40 (a) and (b).

Page 1712, line 23: "Pataki" rather than "Patoque".

Page 1731, line 5: "Goldman" rather than "Gorman".

Page 1751, line 24: "paystub" rather than " -- stop".

Page 1891, line 10: "the feeding" rather than "defeating".

Page 1944, line 2: The last car number is "193" rather than "119."

Page 1947, line 24: "Slinin's home" rather than "Slinin some".

Page 1967, lines 21 and 22: "cancellation" rather than "consolation".

Page 2011, line 20: "Asachi" rather than "Ursacha".

Page 2022, line 19 et seq.: All references to "stroke on stroke" refer to the firm of "Stroock and Stroock".

Page 2035, line 4: "Sheepshead" Bay, rather than "Ship's Head".

Page 2039, lines 10-12: "HEARING OFFICER" rather than "THE WITNESS".

Page 2090, line 10 et seq.: "Veasey" rather than "Veezee".

Page 2144, line 7: "Elite" rather than "Aleef".

APPENDIX B - INDEX TO DECISION'S DISCUSSION OF INDEPENDENT CONTRACTOR ISSUE